TRANSCRIPT OF RECORD

[illegible] OF THE UNITED STATES

[illegible] TERM, [illegible]

[illegible] 36

[illegible], [illegible] OF INTERNAL REVENUE OF THE UNITED STATES FOR THE DIS[illegible] OF [illegible], PLAINTIFF IN ERROR

vs.

[illegible] AND AUGUSTUS P. [illegible], [illegible] OF THE WILL OF JULIA [illegible]

[illegible]

[illegible]

([illegible])

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 393

MALCOLM E. NICHOLS, COLLECTOR OF INTERNAL REVENUE OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS, PLAINTIFF IN ERROR

vs.

HAROLD J. COOLIDGE AND AUGUSTUS P. LORING, EXECUTORS OF THE WILL OF JULIA COOLIDGE

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS

INDEX

1 **In United States District Court, District of Massachusetts**

Writ of error and return

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judge of the District Court of the United States for the District of Massachusetts, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, between Harold J. Coolidge, of Boston, and Augustus P. Loring, of Beverly, in the Commonwealth and District of Massachusetts, executors of the will of Julia Coolidge, late of Brookline, in said Commonwealth and district, plaintiffs, and Malcolm E. Nichols, of Boston, in the Commonwealth and district of Massachusetts, collector of internal revenue of the United States, defendant, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, D. C., on the fourth day of May next, in the said Supreme Court of the United States, that, the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the third day of April, in the year of our Lord one thousand nine hundred and twenty-five.

[SEAL.] JAMES S. ALLEN,
Clerk of the District Court of the United States, District of Massachusetts.

Allowed by
ELISHA H. BREWSTER,
U. S. District Judge.

2 *Return of District Court on writ of error*

DISTRICT COURT OF THE UNITED STATES,
District of Massachusetts, ss:

And now, here, the judge of the District Court of the United States, in and for the district of Massachusetts, makes return of this writ by annexing hereto and sending herewith, under the seal of the District Court, a true and attested copy of the record and proceed-

ings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States as within commanded.

In testimony whereof I, James S. Allen, clerk of said District Court of the United States, in and for the district of Massachusetts, have hereto set my hand and the seal of said court this twenty-fourth day of April, A. D. 1925.

[SEAL.] JAMES S. ALLEN, *Clerk.*

3 In United States District Court

No. 2236, Law Docket

HAROLD J. COOLIDGE ET AL., PLAINTIFFS

v.

MALCOLM E. NICHOLS, COLLECTOR, DEFENDANT

Writ of attachment and marshal's return

Filed Feb. 7, 1924

MASSACHUSETTS DISTRICT, *ss:*

(L. S.) *The President of the United States of America,*

To the Marshal of our District of Massachusetts, or his Deputy, Greeting:

We command you to attach the goods or estate of Malcolm E. Nichols, of Boston, in the Commonwealth and district of Massachusetts, collector of internal revenue of the United States for the district of Massachusetts, defendant, to the value of fifty thousand dollars, and to summon the said defendant (if he may be found in your district) to appear before our judges of our District Court, next to be holden at Boston, within and for our said district of Massachusetts, on the third Tuesday of March, next. Then and there, in our said court, to answer unto Harold J. Coolidge, of said Boston, and Augustus P. Loring, of Beverly, in said Commonwealth and district of Massachusetts, executors of the will of Julia Coolidge, late of Brookline, in said Commonwealth and district, plaintiffs. In an action of contract; to the damage of the said plaintiffs (as they say) the sum of fifty thousand dollars, which shall then and there be made to appear, with other due damages. And have you

4 there this writ, with your doings therein.

Witness, the honorable James M. Morton, jr., at Boston, the tenth day of January, in the year of our Lord one thousand nine hundred and twenty-four.

JOHN E. GILMAN, Jr.,
Deputy Clerk.

Officer's return on writ

BOSTON, *January 12, 1924.*

UNITED STATES OF AMERICA,
Massachusetts District, ss.:

Pursuant hereunto I have this day attached a chip as the property of the within named Malcolm E. Nichols and thereafter on the same day I summoned the within named defendant to appear at court and answer as within commanded by giving to him in hand at Boston, in said district an original summons to the within writ.

WILLIAM J. KEVILLE,
U. S. Marshal.
By JOHN J. HARVEY, *Deputy.*

Service	$2.00
Travel	.12
	$2.12

In United States District Court

Statement re declaration

As filed February 7, 1924

(Memorandum: By agreement of parties, copy of declaration is here omitted as a substituted declaration was later filed and will be found hereafter corded. James S. Allen, clerk.)

In United States District Court

Minute entries

Upon the filing of the writ and declaration herein, an order to plead was entered.

On the seventh day of March, A. D. 1924, the following answer was filed:

In United States District Court

Answer

Filed March 7, 1924

Now comes the defendant in the above entitled action and for answer denies each and every material allegation, item, count and particular in the plaintiffs' writ and declaration contained.

ROBERT O. HARRIS,
United States Attorney.
By ALBERT F. WELSH,
Assistant U. S. Attorney.

5 This cause was thence continued to the March term, A. D. 1924, when, to wit, April 12, 1924, the following motion to amend declaration and substituted declaration was filed and assented to:

In United States District Court

Motion to amend declaration and substituted declaration

Filed April 12, 1924

The plaintiffs move that the declaration be amended by substituting therefor the following:

Substitute declaration

Count 1. Julia Coolidge (the plaintiffs' testatrix) and J. Randolph Coolidge gave certain property to trustees who, by a deed dated July 29, 1907, undertook to hold said property in trust to pay the net income to them or the survivor of them for life and on the death of the survivor to distribute the remainder equally among their five named sons, the next of kin of any deceased son to take such sons's share. By a deed dated April 6, 1917, said Julia Coolidge and J. Randolph Coolidge assigned to their said five sons all right to receive the net income of said trust fund and all their interest in said fund and directed said trustees to pay over such net income to said sons accordingly. Acting on said assignment said trustees have ever since paid the net income to said sons, all of whom are still living. On January 6, 1921, Julia Coolidge died leaving a will which was duly allowed by the probate court for Norfolk County in the Commonwealth of Massachusetts. On February 2, 1921, letters testamentary were issued to the plaintiffs, who were named in said will as the executors thereof, and the plaintiffs now, as at all times since, are such executors. The plaintiffs as such executors made due return of the value of the estate, etc., as required by section 404 of the revenue act of 1918. The Commissioner of Internal Revenue, assuming to treat the trust fund above mentioned as a part of the gross estate of the testatrix within the meaning of said revenue act, assessed with respect to said trust fund a tax in the sum of $25,641.91 and demanded payment of the same. On June 8, 1923, the plaintiffs paid to the defendant (in his capacity of collector of internal revenue of the United States for the district of Massachusetts) under written protest said sum of $25,641.91 together with $1,580.65
6 by way of interest thereon (making a total of $27,222.56), and thereafter seasonably filed with said commissioner a claim for the refunding of the amount so paid. On November 7, 1923, said commissioner rendered a decision disallowing said claim in its entirety upon the ground that said Julia Cooldige must be deemed to have made a transfer of the property in question intended to take effect in possession and enjoyment at her death. Said tax was

erroneously and illegally assessed and payment of said amount of $27,222.56 was erroneously and illegally exacted and said claim for refund was improperly disallowed, (1) because said Julia Coolidge did not within the meaning of section 402 of said revenue act at any time make any transfer of the property in question or at any time create any trust with respect to the same in contemplation of or intended to take effect in possession or enjoyment at or after her death, and (2) because all interests created by said trust deed had become irrevocable and absolutely vested prior to the enactment of said revenue act, so that, if said section 402 is construed as purporting to impose a tax with respect to the transfer of any interests created by said trust deed, it is repugnant to the Constitution of the United States and especially to subdivision 4 of section 9 of Article I thereof and to the fifth amendment thereto. The defendant therefore owes the plaintiffs said sum of $27,222.56, with interest thereon from June 8, 1923.

Count 2. Julia Coolidge (the plaintiffs' testatrix) by deeds dated May 18, 1917, conveyed two parcels of real estate situated respectively in Brookline, in the Commonwealth of Massachusetts and in Boston, in said Commonwealth to their five sons as tenants in common in fee simple. On January 6, 1921, Julia Coolidge died, leaving a will which was duly allowed by the probate court for Norfolk County in said Commonwealth of Massachusetts. On February 2, 1921, letters testamentary were issued to the plaintiffs, who were named in said will as the executors thereof, and the plaintiffs now, as at all times since, are such executors. The plaintiffs as such executors made due return of the value of the estate, etc., as required by section 404 of the revenue act of 1918. The Com-
7 missioner of Internal Revenue, assuming to treat the real
estate above mentioned as a part of the gross estate of the testatrix within the meaning of said revenue act, assessed with respect to said real estate a tax in the sum of $17,635.85 and demanded payment of the same. On June 8, 1923, the plaintiffs paid to the defendant (in his capacity of collector of internal revenue of the United States for the District of Massachusetts) under written protest said sum of $17,635.85 together with $1,087.13 by way of interest thereon (making a total of $18,722.98) and thereafter seasonably filed with said commissioner a claim for the refunding of the amount so paid. On November 7, 1923, said commissioner rendered a decision disallowing said claim in its entirety upon the ground that said Julia Coolidge must be deemed to have made a transfer of said real estate intended to take effect in possession and enjoyment at her death. Said tax was erroneously and illegally assessed and payment of said amount of $18,722.98 was erroneously and illegally exacted and said claim for refund was improperly disallowed, (1) because said Julia Coolidge did not within the meaning of section 402 of said revenue act at any time make any transfer of the real estate in question or at any time create any trust with respect to the same in contemplation of or intended to take effect in possession or enjoyment

at or after her death, and (2) because all interests created by the above-mentioned deeds had become irrevocable and absolutely vested prior to the enactment of said revenue act, so that, if said section 402 is construed as purporting to impose a tax with respect to the transfer of any interests created by said deeds, it is repugnant to the Constitution of the United States and especially to subdivision 4 of section 9 of Article I thereof and to the fifth amendment thereto. The defendant therefore owes the plaintiffs said sum of $18,722.56, with interest thereon from June 8, 1923.

Count 3. The defendant owes the plaintiffs $36,799.37 for money received by the defendant to the plaintiffs' use and interest thereon from June 8, 1923.

STOREY, THORNDIKE, PALMER & DODGE,
Attorneys for Plaintiffs.

We hereby assent to the allowance of the above motion.

ROBERT O. HARRIS,
U. S. Atty.
By ALBERT F. WELSH,
Asst. U. S. Atty.

8 Bill of particulars (accompanying count 3)

1. Money received by the defendant from the plaintiffs on account of an estate tax erroneously and illegally assessed with respect to certain property alleged to be a part of the gross estate of Julia Coolidge, the plaintiffs' testatrix, and paid by the plaintiff to the defendant under protest	$36,799.37
2. Interest on $36,799.37 from June 8, 1923, to January 10, 1924	1,300.24
3. Total due January 10, 1924	38,099.61

In United States District Court

Minute entry of order allowing motion to amend declaration

On the said 12th day of April, the aforementioned motion to amend declaration was allowed by the court, the honorable Elisha H. Brewster, district judge, sitting.

This cause was thence continued from term to term to the September term, A. D. 1924, when, to wit, October 3, 1924, the following agreed statement of facts was filed:

In United States District Court

Statement re agreed statement of facts

(Memorandum: Copy of agreed statement of facts is here omitted, as it forms part of the defendant's bill of exceptions and will be found hereafter recorded. James S. Allen, clerk.)

On the 20th day of October, A. D. 1924, the following substituted request for instructions was filed by the defendant:

In United States District Court

Statement re defendant's substitute request for instructions

(Memorandum: Copy of defendant's substitute request for instructions is here omitted, as it forms part of the defendant's bill of exceptions and will be found hereafter recorded. James S. Allen, clerk.)

In United States District Court

Minute entries

Thereupon, it was ordered by the court that the second request for instructions be granted, all others being denied.

This cause was thence continued to the December term, A. D. 1924, when, to wit, January 28, 1925, a jury was duly empanelled to try the issue, the honorable Elisha H. Brewster, district judge, sitting as aforesaid.

This cause was thence committed to said jury, who, after hearing all matters and things concerning the same, returned the following verdict:

In United States District Court

Verdict

January 28, 1925

The jury find for the plaintiffs, and assess damages in the sum of forty thousand four hundred seventeen dollars and ninety-eight cents ($40,417.98).

FRANK T. SMITH, *Foreman.*

On the 14th day of February, A. D. 1925, a draft bill of ex-
9 ceptions was filed by the defendant.

In United States District Court

Minute entry of order settling bill of exceptions

This cause was thence continued to the present March term, A. D. 1925, when, to wit, April 3, 1925, a substituted bill of exceptions is filed by the defendant and allowed by the court.

In United States District Court

Minute entry of motion for entry of judgment

On the said 3rd day of April, a motion for entry of judgment is filed and allowed.

In United States District Court

Minute entry of judgment

It is thereupon, to wit, April 3, 1925, considered by the court that the said Harold J. Coolidge and Augustus P. Loring, plaintiffs, recover of the said Malcolm E. Nichols, collector, defendant, the sum of forty thousand eight hundred sixty two dollars and fifty-seven cents ($40,862.57) damages, and their costs of suit taxed at ------------.

10 In United States District Court

Substitute bill of exceptions

Filed and allowed April 3, 1925

At the trial of the above entitled action the plaintiffs introduced in evidence the following agreement:

AGREED STATEMENT OF FACTS

It is hereby agreed solely for the purposes of the trial of the above entitled action that the facts hereinafter stated may be treated as in evidence without further proof, reserving to either of the parties the right to introduce further evidence.

1. Julia Coolidge (wife of J. Randolph Coolidge) a citizen of the United States and a resident of Brookline in the county of Norfolk and Commonwealth of Massachusetts died on January 6, 1921, leaving a will which was duly allowed by the probate court for said county on February 2, 1921.

2. On the last mentioned date letters testamentary were issued to Harold J. Coolidge and Augustus P. Loring, the plaintiffs in this action, who were named in said will as the executors thereof and said plaintiffs now, as at all times since said date, are such executors, duly appointed and acting.

3. The plaintiffs as such executors made return of the value of the decedent's estate, etc., as required by section 404 of the revenue act of 1918.

4. The value of the decedent's gross estate was determined in accordance with the provisions of said revenue act (exclusive of the property transferred as stated below) to be $180,184.73. The amounts allowable as deductions under the provisions of said revenue act were in the aggregate $77,747.74.

11 5. On July 29, 1907, the decedent and her husband each in his or her own right transferred certain property to trustees who upon the same day executed, acknowledged and delivered a declaration of trust. Said transfer was voluntary and was not a bona fide sale, for a fair consideration in money on money's worth. The follow-

ing is a true copy of the declaration of trust which was recorded in the registry of deeds for Suffolk County, Massachusetts, on the day of its execution:

Declaration of trust

Whereas J. Randolph Coolidge of Brookline, in the county of Norfolk and Commonwealth of Massachusetts, has by his deed of even date herewith conveyed certain real estate situated in Boston, county of Suffolk and Commonwealth aforesaid, to wit: A parcel of land, with the buildings thereon numbered 19 to 25 High Street, 175 to 179 Federal Street, and 150 to 152 Sumner Street in said Boston, to Augustus P. Loring of Beverly, county of Essex and Commonwealth aforesaid to the use of the said J. Randolph Coolidge, and of the said Augustus P. Loring and of Harold J. Coolidge of said Boston, and the survivor of them, in trust upon certain trusts; and

Whereas Julia Coolidge of said Brookline, wife of the said J. Randolph Coolidge, has by her deed of even date herewith conveyed certain real estate situated in said Boston, to wit: Two several parcels of land, with the buildings thereon, one of them being numbered 62 to 64 Sumner Street, and the second numbered 26 to 30 on Federal Street and 127 on Congress Street, in said Boston, to the said Augustus P. Loring to the use of the said J. Randolph Coolidge, Augustus P. Loring and Harold J. Coolidge, and the survivor of them, in trust upon the same trusts; and

Whereas the said J. Randolph Coolidge and the said Julia Coolidge have each of them by an instrument executed on the twenty-ninth day of July, 1907, assigned and transferred certain personal property as described in the schedule annexed to said instruments, to the aforesaid J. Randolph Coolidge, Augustus P. Loring, and Harold J. Coolidge, to hold as trustees upon the same trusts; and

12 Whereas the said J. Randolph Coolidge and Julia Coolidge may prior to the first of September, 1907, convey or transfer other real estate or personal property to the said trustees to be held upon the same trusts; therefore, be it known, that we, the above-mentioned J. Randolph Coolidge, Augustus P. Loring, and Harold G. Coolidge, do hereby declare that we do hold upon the following trusts, the said real estate and personal property herein referred to, and such other property as may be conveyed or assigned to us prior to September 1, 1907, to hold upon the terms of this trust, together with all accumulations and accretions of the trust fund hereby created, and all property substituted for the original fund under the powers herein given:

1st. In trust to pay the net income of the trust fund to the said J. Randolph Coolidge and the said Julia Coolidge four sevenths ($^4/_7$) and three sevenths ($^3/_7$) respectively to each so long as they both live, and to pay the whole of said net income to the survivor and upon the death of the survivor to distribute equally the trust prop-

erty among the following persons who are children of the said J. Randolph Coolidge and Julia Coolidge, viz: J. Randolph Coolidge, jr., John Gardner Coolidge, Archibald Cary Coolidge, Harold J. Coolidge, and Julian L. Coolidge; and should any of said persons predecease the survivor of the said J. Randolph Coolidge and Julia Coolidge, to pay the share of the person so predeceasing to those who would be entitled to take his intestate property under the statute of distributions in effect at the time of the death of such survivor, provided that in no case shall a surviving widow take as distributee, more than one-half of said share.

2nd. The trustees shall have full power to make, vary, and change investments, and may invest in such real estate, personal property, stocks, bonds and other securities or property as in their opinion are proper investments for this trust fund.

3rd. They may sell any or all the trust property original accruing or substituted, at such times, in such manner, and for such considerations as they think fit, and may convey the same in fee or for
13 any less estate, and no purchaser shall be required to see to the
application of the purchase money paid by him to the trustees or either of them.

4th. They may, in their uncontrolled discretion let or lease the real estate on short or long leases, or on building leases, part of the consideration for which is the improvement of the premises; and no lessee shall be liable for the application of any payment of money made to the trustees or any of them.

5th. They may improve, alter, or rebuild the trust buildings, or build new buildings on the trust lands or on land acquired for that purpose, and may make contracts binding the trust property for the purpose of carrying out any of their powers; but they shall not bind the beneficiaries of the trust, nor need they bind themselves personally.

6th. They may determine what receipts and payments shall be charged or credited to income or principal, and their determination made in good faith shall be final.

7th. They may employ such brokers, engineers, clerks, collectors, agents, or attorneys as they see fit, and shall not be liable for their misbehavior.

8th. They shall account to the beneficiaries once a year, and shall be entitled to receive as compensation for their services five per cent upon the gross amount of the income, and such compensation for extra services as a majority of those beneficiaries who are sui juris shall approve.

9th. All the powers given to the trustees named shall pass to the survivors or survivor and to successors or successor in the trust. At any time when there are three or more trustees in office, any of the trustees may delegate all his powers and authority to the other trustees by an instrument under seal duly recorded, which shall remain in force until revoked by an instrument similarly executed and re-

corded, provided that such delegated power shall not be exercised by less than two trustees.

10th. Any vacancies in the number of the trustees may be filled or an additional trustee or trustees may be appointed by the trustees or trustee in office with the assent of the majority of the bene-
14 ficiaries who are sui juris. If there are no trustees in office, then a trustee or trustees may be appointed by not less than three-fourths of the beneficiaries who are sui juris; and all appointments made under the powers given trustees or beneficiaries by this clause shall be made by an instrument in writing signed and sealed by the parties making the appointment and acknowledged by at least one of them. If no appointment is so made within thirty days from the date when there has ceased to be a trustee in office, any party in interest may apply to the probate court for Suffolk County to appoint a new trustee or trustees.

11th. No trustee hereunder shall be required to give a bond for the faithful performance of his duties, nor shall any trustee be liable for the acts or defaults of another trustee; but each trustee shall be liable for his own willful acts or defaults only.

In witness whereof we have hereunto set our hands and seals this twenty-ninth day of July 1907.

J. RANDOLPH COOLIDGE.
AUGUSTUS P. LORING.
HAROLD J. COOLIDGE
[and each a seal].

We, the undersigned J. Randolph Coolidge and Julia Coolidge assent to the above declaration of trust.

J. RANDOLPH COOLIDGE.
JULIA COOLIDGE.

COMMONWEALTH OF MASSACHUSETTS.
Suffolk, ss:

BOSTON, *July 29, 1907.*

Then personally appeared the above named J. Randolph Coolidge, Augustus P. Loring, and Harold J. Coolidge and acknowledged the foregoing instrument to be their free act and deed before me,

HAROLD D. APOLLONIO,
Justice of the Peace.

A true copy of an instrument left for record with Suffolk deeds July 29, 1907, at four o'clock and twenty-seven minutes P. M.

Attest:

(Signed) WM. T. A. FITZGERALD,
Register.

15 6. Of the property conveyed to trustees as aforesaid the decedent furnished substantially three-sevenths and her husband four-sevenths.

7. On April 6, 1917, the decedent and her husband executed, acknowledged, and delivered an assignment of all their interest in the trust fund and all their right to receive the income therefrom. The following is a true copy of said assignment:

Assignment

Whereas J. Randolph Coolidge and Julia Coolidge, his wife, both of Brookline, Norfolk County, Massachusetts, did by certain instruments dated July 29, 1907, convey certain real estate and personal property belonging severally to them to J. Randolph Coolidge, Augustus P. Loring, and Harold J. Coolidge in trust for certain purposes, and

Whereas a certain declaration of trust signed by the said J. Randolph Coolidge, Augustus P. Loring, and Harold J. Coolidge as trustees, and assented to by the said J. Randolph Coolidge and Julia Coolidge, dated on said July 29th, 1907, and recorded in Suffolk Deeds Book 3227, page 260, sets forth the purposes of said trust to be as follows:

To pay the income from the trust fund in certain proportions to the said J. Randolph Coolidge and Julia Coolidge so long as they both live, and to pay the whole of said net income to the survivor; and upon the death of the survivor to distribute equally the trust property among the following named persons who are children of the said J. Randolph Coolidge and Julia Coolidge, viz: J. Randolph Coolidge, junior, John G. Coolidge, Archibald C. Coolidge, Harold J. Coolidge, and Julian L. Coolidge, and

Whereas the said J. Randolph Coolidge and Julia Coolidge now desire to transfer and assign all their title and interest in and to the income of said trust fund in equal shares to their said five children, who are now all living.

Now then, we, the said J. Randolph Coolidge and Julia Coolidge in consideration of one dollar and other good and valuable
16 consideration to us paid by the said J. Randolph Coolidge, jr., John G. Coolidge, Archibald C. Coolidge, Harold J. Coolidge, and Julian L. Coolidge, the receipt whereof is hereby acknowledged, do hereby transfer, convey, and assign to the said J. Randolph Coolidge, jr., John G. Coolidge, Archibald C. Coolidge, Harold J. Coolidge, and Julian L. Coolidge, in equal shares, all our interest in said trust fund, and all our right to receive the income therefrom, including additions thereto and any accrued income which has not already been paid over to us.

To have and to hold the same to the said J. Randolph Coolidge, jr., John G. Coolidge, Archibald C. Coolidge, Harold J. Coolidge, and Julian L. Coolidge, their executors, administrators, and assigns forever.

And we hereby request and direct Harold J. Coolidge and Augustus P. Loring, the present trustees of said fund, henceforth to pay over the income to our said five children in accordance with this assignment.

In witness whereof we hereunto set our hands and seals this sixth day of April, 1917.

(Signed) J. RANDOLPH COOLIDGE. [SEAL.]
" JULIA COOLIDGE.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

BOSTON, *April 6, 1917.*

Then personally appeared the above named J. Randolph Coolidge and Julia Coolidge, and acknowledged the foregoing instrument by them signed to be their free act and deed.

Before me, (Signed) HOWARD S. PATTERSON
Justice of the Peace.

APRIL 6th, 1917.

We, the undersigned, being the present trustees of the above-mentioned trust fund, hereby acknowledge the receipt of notice of the above assignment.

(Signed) HAROLD J. COOLIDGE,
AUG. P. LORING.

17 8. The Commissioner of Internal Revenue upon review and audit of the return filed by the executors as aforesaid increased the gross estate by adding thereto the value as of the date of death of Julia Coolidge (which value was $432,155.35) of that part of the trust property which was furnished by her as aforesaid, although as a result of changes in investments, etc., much of that property was no longer held by the trustees in specie at the time of her death.

9. By deeds dated May 18, 1917, Julia Coolidge conveyed two parcels of real estate situated respectively in Brookline in the Commonwealth of Massachusetts and in Boston in said Commonwealth to her five sons as tenants in common in fee simple.

10. The deed of the Brookline property was executed, acknowledged, and delivered on May 18, 1917, and was recorded in the Registry of Deeds for Norfolk County, Massachusetts, on May 19, 1917. This deed (omitting the description of the premises) reads as follows:

"We, J. Randolph Coolidge, of Brookline, in the county of Norfolk, Massachusetts, and Julia Coolidge, his wife, in her right, for consideration paid, grant to J. Randolph Coolidge, jr., John G. Coolidge, Archibald C. Coolidge, all of said Brookline, Harold J. Coolidge, of Boston, Suffolk County, and Julian L. Coolidge, of Cambridge, Middlesex County, with warranty convenants the land in Brookline with the buildings thereon situated on Boylston Street, bounded and described as follows:

[Description immaterial.]

"Witness our hands and seals this 18th day of May 1917.

"(Signed) J. RANDOLPH COOLIDGE. [SEAL.]
"(Signed) JULIA COOLIDGE. [SEAL.]"

11. At the time the above-mentioned deed was executed the grantees therein named executed and delivered a lease, which reads as follows:

"This indenture, made this day of May in the year one thousand nine hundred and seventeen between J. R. Coolidge,
18 jr., John G. Coolidge, Archibald C. Coolidge, Harold J. Coolidge, and Julian L. Coolidge, of the first part, and J. Randolph Coolidge and Julia Coolidge of the second part, witnesseth:

"That the said party of the first part doth hereby demise and leave unto the said party of the second part the premises known as 'Hill-fields,' Chestnut Hill, Brookline, Massachusetts.

"To have and to hold the same for the term of one year beginning with the day of May, 1917.

"Yielding and paying therefor rent at the annual rate of one dollar.

"And the lessor hereby covenants with the lessee that they shall peaceably hold and enjoy the said premises as aforesaid.

"And the lessees hereby covenant with the lessors that they will keep the buildings fully insured against damage by fire and that they will pay all taxes assessed against the premises.

"And the lessee further covenants with the lessor that he will pay the said rent in manner aforesaid; and also all water rates to which said premises or any part thereof may become liable during the said term and all charges for light and power supplied in the leased premises during said term; that he will not without the consent in writing of the lessor, assign this lease, nor underlet the whole or any part of said premises, nor make or suffer any alterations or additions in or to the same; that he will save the lessor harmless and indemnified from and against all loss, liability, or expense, that may be incurred by reason or any accident with the machinery, hatchways, elevators, gas, water, or other pipes, or from any damage, neglect, or misadventure arising from, or in any way growing out of, the use, misuse, or abuse of water, or from the bursting of any pipes, or from neglect in the use of coal-holes and covers, or in not removing snow and ice from the sidewalks; that he will keep whole and in good order all glass, pipes, faucets, water fixtures, machinery, etc., under his control and in his use, and leave the same in good condition at the termination of this lease, reasonable wear excepted; and he acknowledges that the same are now whole and in good condition; that he will allow the lessor and his agents at reasonable times to enter upon same premises and examine the condition thereof and make necessary repairs, if not otherwise provided for; that he will not require the lessor to make any repairs; and that he will keep all and singular the said premises in such repair as the same are in at the commencement of said term or may afterwards be put in by the lessor, reasonable use and wearing thereof and damage by fire or other unavoidable casualties only excepted; and at the end of

said term will peaceably deliver up to the lessor the said premises, together with all future erections or additions upon or to the same, in such repair as aforesaid, and vacant and unincumbered and in good and tenantable order and condition.

"The lessee further covenants that he will conform to all rules and regulations and obey all orders of all State and municipal boards or departments respecting the leased premises during said term.

"The lessee shall have the right to cut down trees, to remove any plants and shrubs, etc., and to relocate any paths or driveways.

19 "Provided always, and these presents are upon this condition, that in case of a breach of any of the covenants to be observed on the part of the lessee, or of those claiming under him, or in case the estate hereby created shall be taken from him by process of law, or a petition in bankruptcy or insolvency has been filed by or against the lessee the lessor may while the default or neglect continues, or at any time after such taking by process of law, or filing of said petition and notwithstanding any license or waiver of any prior breach of condition, without any notice or demand, enter upon the premises and thereby determine the estate hereby created; and may thereupon expel and remove, forcibly if necessary, the lessee and his effects.

"This lease shall be taken to be renewed for the term of one year from the end of the specified term, and thereafter shall be taken to be renewed from year to year unless written notice is given by either party to the contrary at least one month before the end of the original term or any renewal thereof.

"No omission on the part of the lessor to insist upon the performance of any obligation, or covenant of the lessee, or enforcement of any right reserved to the lessor, shall be deemed to be a waiver of such obligation, covenant, or right, in that or any other instance; nor a waiver of any other obligation, covenant, or right for the lessor's benefit contained in said lease.

"The word 'lessor' wherever used in this instrument comprises heirs, successors, and assigns; and the word 'lessee' means lessee or lessees, and comprises executors, administrators, and assigns.

"In witness whereof the said parties hereunto, and to another instrument of like tenor, set their hands and seals on the day and year first above written.

"(Signed) J. RANDOLPH COOLIDGE, JR. [SEAL.]
"JOHN GARDNER COOLIDGE [SEAL.]
"JOHN F. MOORE, Atty.
"ARCHIBALD CARY COOLIDGE [SEAL.]
"HAROLD J. COOLIDGE [SEAL.]
"JULIAN L. COOLIDGE [SEAL.]"

12. The deed of the Boston property was executed, acknowledged and delivered on May 18, 1917, and was recorded in the registry of

deeds for Norfolk County, Massachusetts, on the same day. This deed (omitting the description of the premises) reads as follows:

"We, J. Randolph Coolidge, of Brookline, in the county of Norfolk, Massachusetts, and Julia Coolidge, his wife, in her right, for consideration paid, grant to J. Randolph Coolidge, jr., John G. Coolidge, Archibald C. Coolidge, all of said Brookline, Harold J. Coolidge, of Boston, Suffolk County, and Julian L. Coolidge, of Cambridge, Middlesex County, with warranty covenants the land in Boston with the buildings thereon now numbered 130
20 Beacon Street and bounded and described as follows:

[Description immaterial.]

"Witness our hands and seals this 18th day of May, 1917.

"(Signed) J. RANDOLPH COOLIDGE, JR. [SEAL.]
" " JULIA COOLIDGE. [SEAL.]

13. At the time the last-mentioned deed was executed the grantees therein named executed and delivered a lease of the granted premises identical in tenor (except as to the description of the granted premises and except the provision reading, "The lessee shall have the right to cut down trees, to remove any plants and shrubs, etc., and to relocate any paths or driveways" is omitted) with the above-mentioned lease of the Brookline property.

14. Both the parcels of real estate above mentioned were for many years prior to May 18, 1917, owned by the decedent in her own right and occupied by her and her husband as places of residence. When the aforesaid leases were made it was understood by the parties that, should the lessees desire to continue to occupy the residences on the leased estates for the purpose of residing therein themselves, the leases would continue to be renewed from year to year during the lifetime of the lessees or either one of them.

15. The conveyances of said parcels of real estate were voluntary and neither of them was a bona fide sale, for a fair consideration in money or money's worth. The value of the two parcels at the time of the decedent's death was $274,300.

16. The Commissioner of Internal Revenue upon review and audit of the return filed by the executors increased the gross estate by adding thereto the value as of the date of the decedent's death of the two parcels of real estate above mentioned.

17. By reason of the inclusion in the decedent's gross estate of the value of the trust property as set forth in paragraph 8 of this agreement and the inclusion of the value of the real estate as set forth in paragraph 16 the Commissioner of Internal Revenue assessed an additional tax in the sum of $34,662.65 which to-
21 gether with interest thereon amounting to $2,136.73, the plaintiffs on June 8, 1923, paid under written protest and under duress. Thereafter the plaintiffs duly filed a claim for a refund of the tax and interest so paid under protest and duress, which claim the Commissioner of Internal Revenue rejected prior to the institution of this suit.

18. The amount of additional tax and interest which would have been due had the value of the property transferred by the decedent in trust as set out in paragraph 5 of this agreement but not the value of the real estate conveyed as set out in paragraph 9 of this agreement been included in the gross estate would have been $18,-106.60. The amount of additional tax and interest if the value of the said real estate but not the value of the said trust property had been included in the gross estate would have been $9,507.03.

19. No part of the aforesaid additional tax or interest has been refunded.

(Signed) STOREY, THORNDIKE, PALMER & DODGE,
Attorneys for plaintiffs.
ROBERT O. HARRIS, *U. S. Atty.*,
ALBERT F. WELSH, *Asst. U. S. Atty.*,
Attorneys for defendant.

No other evidence was offered by either party.

PLAINTIFFS REQUESTED INSTRUCTIONS TO JURY

The plaintiffs presented the following requests for instructions:

1. The payment referred to in the first count of the declaration was exacted unlawfully.

2. The payment referred to in the second count of the declaration was exacted unlawfully.

3. Upon all the evidence the plaintiffs are entitled to recover the sum of $36,799.38 with interest at six per cent. from June 8, 1923, to the date of the verdict.

4. If the plaintiffs are entitled to recover the payment referred to in the first count of the declaration, but not that referred to in the second count, the verdict should be for the plaintiffs in the sum of $27,292.35 with interest at six per cent. from June 8, 1923, to the date of the verdict.

22 5. If the plaintiffs are entitled to recover the payment referred to in the second count of the declaration, but not that referred to in the first count, the verdict should be for the plaintiffs in the sum of $18,692.78 with interest at six per cent. from June 8, 1923, to the date of the verdict.

6. The property referred to in the first count of the declaration as having been conveyed by Julia Coolidge to trustees was not a part of her "net estate" within the meaning of the revenue act of 1918.

7. The real estate referred to in the second count of the declaration was not a part of the "net estate" of Julia Coolidge within the meaning of the revenue act of 1918.

8. If the revenue act of 1918, according to its true construction, purports to authorize the exaction of the payment referred to in the first count of the declaration, it is to that extent void because not an exercise of any power granted to Congress by the Constitution of the United States.

9. If the revenue act of 1918, according to its true construction, purports to authorize the exaction of the payment referred to in the first count of the declaration, it is to that extent repugnant to sub-section 4 of section 9 of Article I of the Constitution of the United States.

10. If the revenue act of 1918, according to its true construction, purports to authorize the exaction of the payment referred to in the first count of the declaration, it is to that extent repugnant to the fifth amendment to the Constitution of the United States.

11. If the revenue act of 1918, according to its true construction, purports to authorize the exaction of the payment referred to in the second count of the declaration, it is to that extent void because not an exercise of any power granted to Congress by the Constitution of the United States.

12. If the revenue act of 1918, according to its true construction, purports to authorize the exaction of the payment referred to in the second count of the declaration, it is to that extent repugnant to sub-section 4 of section 9 of Article I of the Constitution of the United States.

23 13. If the revenue act of 1918, according to its true construction, purports to authorize the exaction of the payment referred to in the second count of the declaration, it is to that extent repugnant to the fifth amendment to the Constitution of the United States.

DEFENDANT'S REQUESTED INSTRUCTIONS TO JURY

The defendant presented the following requests for instructions:

1. That section 402 (c) of the revenue act of 1918 is constitutional in its provision that there shall be included in the gross estate of a decedent dying after the passage of the act the value at the time of death of all interests in property, real or personal, tangible or intangible, wherever situated, with respect to which the decedent has prior to the passage of the act created a trust or made a transfer intended to take effect in possession or enjoyment at or after the death of the decedent.

2. That the trust created by Julia Coolidge in her life-time was intended to take effect in possession or enjoyment at or after her death and the value of the interest with respect to which she created such trust was a part of her gross estate under the aforesaid act.

3. That the subsequent assignment by Julia Coolidge of her share of the income from and of her interest in the trust mentioned in the pleadings did not make it improper to include in her gross estate the value of the interest with respect to which she had previously created a trust intended to take effect at or after her death as set forth in the court's second instruction.

4. That the transfers of real estate to her children by Julia Coolidge in her life-time were transfers intended to take effect in possession or enjoyment at or after her death within the meaning of the aforesaid act.

5. That the value to be included in the gross estate of Julia Coolidge under the provisions of the aforesaid act, is the value as of the time of her death of the real estate transferred to her children and of the real estate and personalty transferred to the trustees.

24 5½. That the findings of the commissioner as to the values of the interests to be included in the gross estate are prima facie correct and that there is no evidence in this case to overcome such prima facie showing.

6. That under the pleadings and evidence in this case the plaintiffs are not entitled to recover and your verdict must be for the defendant.

CHARGE TO JURY

The court charged the jury as follows:

Gentlemen of the jury:

This is an action of contract brought by the plaintiffs, as executors under the will of Julia Coolidge, late of Brookline, in this Commonwealth, against Malcolm E. Nichols, as collector of internal revenue for the district of Massachusetts. The suit is brought to recover a sum of money paid to the collector by the executors under protest, in response to a demand for an additional tax assessed upon the estate of Julia Coolidge. The plaintiffs claim the estate is not liable for this additional tax.

In this case the only evidence before you is that included in the agreed statement submitted by counsel. None of the material facts are in controversy, therefore no issue of fact is presented. Rather, this is a case where it becomes necessary for the court to determine as a matter of law whether, upon these facts, the plaintiffs are entitled to recover, and if so in what sum. The amount involved is considerable, and the questions of law calling for consideration involve the construction and validity of an act of Congress. I have, therefore, given much thought to the arguments and brief of counsel, have examined the authorities submitted and have reached certain conclusions which I will undertake to state as clearly as I may.

Since the disposition of this case depends upon the determination of questions of law rather than issues of fact, I shall depart somewhat from my usual practice in jury trials and elaborate somewhat the reasons upon which these conclusions are based.

From the undisputed evidence, it appears that on July 29, 1907, Julia Coolidge joined with her husband, J. Randolph Coolidge, in an instrument of transfer whereby she and her husband trans-
25 ferred and conveyed to trustees named certain real and per-
sonal property. The trustees on the same day duly executed a declaration of trust respecting the property so conveyed, together with all accumulations and accretions and all property substituted for the original fund, which trust provided that the trustees should pay the net income—three-sevenths to Julia Coolidge and four-sevenths to J. Randolph Coolidge "so long as they both live and to pay the whole of said net income to the survivor; and upon the

death of the survivor to distribute equally the trust property among the following persons, who are children of said J. Randolph Coolidge and Julia Coolidge, viz: J. Randolph Coolidge, jr., John Gardner Coolidge, Archibald Carey Coolidge, Harold J. Coolidge, and Julian L. Coolidge; and should any of said persons predecease the survivor of the said J. Randolph Coolidge and Julia Coolidge, to pay the share of the person so predeceasing to those who would be entitled to take his intestate property under the statute of distribution in effect at the time of the death of said survivor, provided that in no case shall a surviving widow take as distributee more than one-half of said share."

On April 6th, 1917, Julia Coolidge and J. Randolph Coolidge joined in another written instrument whereby they transferred, conveyed and assigned to J. Randolph Coolidge, jr., John Gardner Coolidge, Archibald Carey Coolidge, Harold J. Coolidge, and Julian L. Collidge, in equal shares, all their interests in said trust fund, and all their right to receive the income therefrom, including additions thereto and any accrued income which had not already been paid over to them, and the trustees by said instrument were requested and directed to pay the income to said five children in accordance with the assignment.

On May 18th, 1917, Julia Coolidge executed two deeds
26 whereby she conveyed to the five sons already named two certain parcels of real estate, one situated in Boston and the other in Brookline. The deeds were in statutory short form of deeds with warranty covenants obtaining in Massachusetts and were recorded on May 18th and May 19th, 1917, respectively.

At the time these deeds were given, the grantees named therein executed and delivered a lease covering each of the properties conveyed which, in all material respects, were identical except as to description. Each lease was for the term of one year, and the rent reserved was at the annual rate of $1.00. Each lease contained the usual covenants found in the form commonly used in Massachusetts and contained also these pertinent provisions:

"This lease shall be taken to be renewed for the term of one year from the end of the specified term, and thereafter shall be taken to be renewed from year to year unless written notice is given by either party to the contract at least one month before the end of the original term or any removal thereof."

Both parcels of real estate conveyed by the deeds were for many years owned by the decedent in her own right and occupied by her and her husband as places of residence. When the leases were made it was understood by the parties that should the lessees desire to continue to occupy the residences on the leased premises for the purpose of residing therein themselves, the leases would continue to be renewed from year to year during the life of the lessees or either of them.

The conveyance to the trustees and the conveyance of the Boston and Brookline real estate were not bona fide sale for a fair considera-

tion in money or moneys' worth within the meaning of the provisions of acts of Congress to which your attention will be presently directed.

Julia Coolidge died January 6th, 1921, leaving a will duly admitted to probate in the county of Norfolk in this Common-
27 wealth. The plaintiffs are executors of that will. Mrs. Coolidge left a gross estate, exclusive of the property to which I have called attention, of over \$180,000.00 and a net estate of over \$100,000.00. The Commissioner of Internal Revenue increased the gross estate by adding thereto \$432,155.35, the value as of the date of the death of Julia Coolidge of that part of the trust property which was deemed to have been conveyed by her in trust, although, as a result of changes in investment, much of the property originally received by the trustees was not held by them in specie at the time of her death. The Commissioner of Internal Revenue also included in her gross estate \$272,300.00, being the value at the time of her death of the property conveyed by the two deeds already referred to.

As a result of this action on the part of the Commissioner of Internal Revenue, an additional tax was assessed against the estate, with interest amounting to \$36,799.38, which sum the plaintiffs paid under protest June 8th, 1923, and plaintiffs' claim for a refund having been duly filed and having been denied by the Commissioner of Internal Revenue, this suit is brought to recover the sum paid with interest from June 8th, 1923.

The ultimate questions to be determined are these: Did the Commissioner of Internal Revenue have a right to include in the gross estate of the decedent:

(a) The value at the time of her death of the property held by the trustees under the declaration of trust heretofore mentioned, and

(b) The value of the Boston and Brookline real estate conveyed by the decedent to her five sons by the two deeds aforementioned.

In the revenue act of 1918 Congress imposed a graduated estate tax upon the transfer of the net estate of every decedent dying after the passage of the act. The tax was to be measured by the value of the net estate, which was to be determined by deducting from
28 the gross estate certain sums and charges not now necessary to enumerate. The important provisions of the law are those which define and limit the value of the gross estate for the purposes of the tax. These provisions are as follows:

"SEC. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated. * * *

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this act), except in case of a bona fide sale for a fair consideration

in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;"

It is claimed by the Government that the value of both the property conveyed in trust and the real estate conveyed outright came within the scope of this section as transfers made or trusts created with the intention that they should take effect in possession or enjoyment at, or after, the death of Mrs. Coolidge. I do not understand that it is claimed here that there was any completed gift inter vivos made in contemplation of death, and if there was such a claim the transfers having been made more than two years prior to the death of Mrs. Coolidge you would not be justified in finding that they were made in contemplation of death in the absence of any affirmative evidence tending to show that they were so made.

It follows, therefore, that if the value of this property, or any of it, is to be included in the gross estate it is because the facts support the contention of the Government that the transfers were intended to take effect in possession and enjoyment at or after the death of the decedent.

29 It becomes necessary, therefore, to determine whether (1) the transfer in trust and (2) the outright conveyances of real estate, were intended to take effect in possession and enjoyment after Mrs. Coolidge's death.

I do not have much difficulty in reaching a conclusion respecting the deeds of the Boston and Brookline real estate, and I will first consider the claims of the parties respecting those transfers.

The deeds conveyed, with warranty covenants, absolute and indefeasible title to the real estate without any valid reservations, conditions or restrictions whatsoever.

The leases, executed the same day, were for one year or any renewal thereof but were always subject to the right in the lessors to terminate the term during any year by giving the notice as therein provided. It is conceded that the parties contemplated that the premises would be enjoyed by the decedent and her husband so long as they might desire to use them for residential purposes, but the decedent had no valid agreement to that effect. Her rights must be held to be governed by the term of the lease. If it could be said that the grantee did not come into full possession and enjoyment of the estate at the time of the conveyances—and I am inclined to the opinion that they did—their right to come into full possession did not depend in the slightest degree upon the death of the grantor. The effect of this transaction was to vest in the five sons named in the deed full and complete title to the property including the right of disposition. They had a right to sell the property subject to the lease and had all rights incident to ownership. There was

here a gift completed during the lifetime of the donor. The act of 1918 did not purport to tax such gifts.

I have reached the conclusion, therefore, that respecting the property conveyed by the deed, the facts of this case do not bring the property within the reach of the statute and that the Commissioner of Internal Revenue was without authority to include
30 the value of it as a part of the gross estate. I, therefore, give the following instructions, as requested by the plaintiffs: The real estate referred to in the second count of the declaration was not a part of the net estate of Julia Coolidge within the meaning of the revenue act of 1918.

The plaintiffs also claim that the transfer in trust was not one to take effect in enjoyment and possession after death within the scope of the act and, therefore, the value of the property transferred should not have been included.

In the first place, it is necessary to inquire into the nature of the estate arising as a result of the transfer of July 29th, 1907, and the assignment of April 6th, 1917. The effect of these instruments was to divest Mrs. Coolidge of all interest in the property, the sons becoming, in effect, equitable owners in fee, subject only to the possibility that if a son died during the lifetime of the parents, or the survivor of them, his share would go to the next of kin. The interest of the sons, therefore, was not a contingent interest but rather a vested interest liable to be divested by death before the death of the survivor of the parent. They would not, however, come into the full possession and enjoyment of the trust property; they could not exercise full dominion over it, sell or otherwise dispose of it, until the termination of the trust, and by its terms the trust was not to be terminated until on or after the death of the decedent.

But the decedent had entirely parted with all her right, title and interest, legal or equitable, in the property, retaining no interest therein which would cease upon her death.

If I understand correctly the contentions of the plaintiffs, it is because of this fact that I am asked to instruct you, as a matter of law, that the property held in trust and referred to in the first count of the declaration was not a part of her "net estate"
31 within the meaning of the revenue act of 1918. I think, however, that this request requires me to place a construction upon the provisions of section 402 (c) somewhat too narrow. This appears when we consider the nature of the tax and the fact that the real question here is whether the value of the property so transferred shall be included in the total valuation which furnishes the measure of the tax. The tax is not laid upon the property transferred nor upon the transfer. The tax has been held to be on the right to transmit or on the transmission at the beginning. The decedent, having left an estate which is transmitted upon her death, it has become taxable and in determining the amount of tax which

the estate shall pay the statute expressly provides that there shall be included in the measure of the tax the value of property "to the extent of any interest therein of which the decedent has at any time made a transfer or in respect to which he has at any time created a trust in contemplation of, or intended to take effect in possession or enjoyment at or after his death."

The term "intended to take effect in possession or enjoyment at or after his death" and the term "in contemplation of death" had both been frequently the subject of judicial definition, and it may be assumed that in drafting the act, Congress had in mind these definitions. We find that the courts had held that a transfer in trust similar to the one before us in this case, where the donor had parted with all his interest in property that was to be held in trust until on or after the death of the donor, was a transfer to take effect in possession or enjoyment on or after death. Although the income was payable to the sons, the intention of Mrs. Coolidge obviously was that the principal of the trust fund should not vest in full possession and enjoyment until after her death.

It is pointed out that we are not now dealing with a tax
32 on legacies or successions; that the tax is laid, not on the right to receive property upon death but on the right to transmit it upon death, and it is, therefore, argued that unless the decedent had some interest in the property, the transfer of which is sought to be included, it has no place in the valuation upon which the tax is to be computed; that this case should be distinguished from those cases where the courts have deemed transfers similar to the one before us subject to legacy and succession taxes. I am unable to discern any distinction in principle. If a transfer is one to take effect in possession and enjoyment after death, it may be reached under a statute imposing an estate tax. Granting, as we must, that Congress has power to levy a tax upon the net estate of a decedent, it may adopt any reasonable measure of that tax. Admittedly, it is entirely reasonable to measure the tax by the value of the property transmitted by will or by intestate laws and I do not think it can be said to be unreasonable to measure the tax also by the value of property of which a decedent during his lifetime has made a disposition which partakes of the nature of a testamentary disposition. In such a case the reasonableness of the measure would not depend on whether the decedent had reserved any interest in the property which would cease upon his death. A completed transfer inter vivos, made in contemplation of death, leaves no interest in the grantor. Whether the transmission be by will, by intestate laws or by transfers to take effect on or after or in contemplation of death the transmission bears in each case a reasonable relation to the event of death.

I am of the opinion, therefore, that the trust created by Mrs. Coolidge was a transfer to take effect in possession or enjoyment at or after her death within the meaning of the act of 1918, and that

the value of the transfer should be included in her net estate unless the retroactive provisions expressly incorporated for the first
33 time in the act of 1918 are held to be beyond the power of Congress to enact. This act provides that the value of the property so transferred shall be included, whether such transfer or trust is made or created before or after the passage of the act.

The plaintiffs in effect ask me to say to you that these provisions are unconstitutional and void so far as they apply to the property transferred in trust by this decedent.

This request gives rise to the most difficult questions of law found in this case, and one which I confess is not entirely free from doubt. A court of first instance, I take it, should be reluctant to set aside as beyond the constitutional authority of Congress a purpose clearly declared. On the other hand, we are dealing with a law imposing the burden of taxation and the authority of Congress cannot be extended by implication. In view of the construction which I have put upon the act, the rights of the parties to this litigation cannot be settled without disposing of plaintiffs' request.

You have before you a situation where the decedent during her lifetime and at a time when no tax was imposed on the transfer had entirely divested herself of all interest in the trust property which was included by the Commissioner of Internal Revenue in the gross estate. It was a completed transaction. All interests in the property had vested in others.

We have, therefore, an attempt on the part of the Government to exact an estate or indirect tax computed upon the value of property which did not constitute a part of decedent's estate but concerning which, at a time when it was not taxable, she had made a transfer that did not take effect in full possession and enjoyment until after her death. I am of the opinion that the express terms of the act providing the standard by which this tax is to be measured embraces such property. The constitutional question presented is whether it lies within the power of Congress to adopt a
34 criterion which would extend to such property transferred under such circumstances.

It has been stated that the nature of the excise or indirect tax forbids retroactive operation; that to exact a tax upon the privilege of consummating a transfer after it is completed leaves no choice in the tax payer and the tax becomes an unavoidable and absolute demand, thereby losing its essential characteristics as an excise or indirect tax, and becomes in effect a direct assessment upon the property itself simply because of ownership, and as such is unconstitutional unless apportioned among the states.

Ordinarily, a tax which cannot be shifted or the payment avoided is deemed a tax upon the holder thereof in respect to his ownership of property and, therefore, a direct tax; but after a careful examination of the authorities on this point I am not prepared to state it as my opinion that Congress has not authority to give retroactive effect to a law providing an indirect tax.

If these express retroactive provisions now under consideration are to be deemed unconstitutional, as applied to the facts before us, it would seem to be rather upon the ground that the attempt was an unreasonable and arbitrary exercise of the taxing power.

The powers of Congress to provide the measure of a tax laid upon a legitimate object is far-reaching and must be upheld unless it is wholly arbitrary and unreasonable. What is the test of reasonableness? I gather from the cases and from the brief filed by the Government that the reasonableness of the classification turns upon the question of whether the transfer sought to be included bears any reasonable relation to the net estate of the decedent.

It is the contention of the Government that although the defendant had, prior to the passage of the act of 1918, parted with all her interest in the property, her death was a "generating source"
85 of the possession and enjoyment and that, therefore, a reasonable basis existed for including the value of the property in the measure of the tax. As I do not accept the premise as sound, I am unable to adopt the conclusion. Nothing passed upon the death of Mrs. Coolidge. Upon her death no interest ceased with corresponding accretion to the living. The only possible effect of her death would be to change the relationship between the beneficiaries and the trust fund. I regard the transfers rather than her death as the "generating source" even of the enjoyment and possession.

From the agreed facts it must be admitted that the property sought to be included as a part of the decedent's estate belonged to others at the time of her death. Clearly, there must be some limitation to the power of Congress to exact a tax on one measured by property of another. I take it the Government would not seriously contend that an estate tax could be levied upon the estate of A, to be measured by the value of B's property, when neither the property of B nor the manner of its acquisition bore any reasonable relation to the subject matter of the tax.

I am unable to perceive on what grounds it could be successfully claimed that the transfer in question, or the property transferred, could be said to bear any reasonable relation to the thing taxed. If, at the time of her death, the decedent had some interest in the property which terminated by reason of said death, or if, at the time the tranfer was made, it was taxable, a different situation would arise. In the case before us neither of these conditions exist. The right to impose a tax carries with it the right to adopt all reasonable measures to prevent an evasion of the tax. On this ground the power to measure an estate tax may properly be extended to gifts in contemplation of death or gifts to take effect after death because both are transfers in the nature of testamentary dispositions
86 and could be easily resorted to for the purpose of evading the tax. I entertain, however, grave doubts whether such power could be reasonably extended to such a transfer if completed before the effective date of the law. In every case of transmission by will, intestate laws or transfers to take effect after death or in contemplation of death, a power, right or privilege has been exerted

or exercised. When one has availed himself of this privilege with knowledge of the tax, actual or constructive, he has voluntarily subjected himself to its burden, and a statute which includes in the measure of the tax the value of the property thus transferred may well be deemed to have provided a reasonable classification, and this even if the decedent has entirely parted with all interest in the property; but when one has, prior to the imposition of the tax, parted with all control over or interest in the property, the classification becomes arbitrary and unreasonable. Such arbitrary inclusion of property of others has been held in other jurisdiction invalid as unconstitutional.

It has been held that a State possesses no authority to tax remainder, or reversionary, interests created by deed or will prior to the enactment of the law imposing the tax on the theory that State legislatures are without power to destroy or impair the value of vested interests. It has never been suggested that the powers of the State to impose inheritance tax was inferior to that of the Federal Government. It is true that the statutes which have been held unconstitutional for this reason have imposed succession rather than estate taxes. The conclusions reached, therefore, would not be controlling but would be significant, I think, upon the question of reasonableness of classification.

I do not find that the precise question here presented, and with which I have undertaken to deal somewhat at length, has ever
37 been passed upon by our court of last resort. The inferior
courts seem not to be in accord. I am fully aware of the importance of the issue raised in its effect upon the revenues of the Government and for that reason have been led to give most careful thought and study to the helpful briefs filed in the case. As a result, I have reached the conclusion that the retroactive provisions of the act of 1918, so far as they apply to a transaction entirely completed before the passage of the act, are unconstitutional and void and that, therefore, the action of the Commissioner of Internal Revenue in including as a part of her net estate the property conveyed in trust by Mrs. Coolidge is without authority.

It follows from what I have said that the plaintiffs are entitled to the instruction already referred to, namely: That if the revenue act of 1918, according to its true construction, purports to authorize the exaction of the payment referred to in the 1st count of the declaration, it is to that extent void because not an exercise of any power granted to Congress by the Constitution of the United States.

The exaction of the payments referred to in the 1st and 2nd counts of the plaintiffs' declaration being without authority I say to you, as a matter of law, that upon all the evidence the plaintiffs are entitled to recover the sum of \$36,799.38, with interest at the rate of 6 per cent from June 8, 1923, to the date of verdict, which counsel agree amounts to \$3,618.60.

The 1st, 2nd, 3rd, 7th, 8th, 9th, and 10th requests for instructions submitted by plaintiffs are consistent with this charge and I accord-

ingly give instructions as requested. In view of my concessions, it becomes unnecessary to consider the 4th, 5th, 11th, 12th, and 13th requests. The 6th request I deny.

Of the defendant's request for instructions, the 2nd is consistent with what I have said and is, therefore, granted. All other requests are denied.

You will, therefore, by order of court return a verdict for the plaintiffs in the sum of $40,417.98.

The plaintiffs excepted to the denial of their sixth request. The defendant excepted to the denial of his requests numbered
38 respectively 1, 3, 4, 5, 5½, and 6, to the giving of the plaintiffs' requests numbered respectively 1, 2, 3, 7, 8, 9, and 10 and to the ordering of a verdict for the plaintiffs.

The defendant, being aggrieved by the aforesaid refusals to instruct the jury as requested by him, by the giving of the aforesaid instructions requested by the plaintiffs and by the directing of a verdict in favor of the plaintiffs, brings this his bill of exceptions and prays that the same be allowed.

MALCOLM E. NICHOLS,

By his Attys.,

HAROLD P. WILLIAMS,
U. S. Atty.,
ALBERT F. WELSH,
Asst. U. S. Atty.

Order settling bill of exceptions

Allowed: 4/3/25. E. H. B., D. J.

In United States District Court

Petition for writ of error and order allowing same

Filed April 3, 1925

Now comes Malcolm E. Nichols, Collector of Internal Revenue for the District of Massachusetts, in the above entitled cause and says that on or about the third day of April, 1925, this court entered judgment herein, in which judgment and proceedings had prior thereunto in this cause, certain errors were committed to the prejudice of the defendant which appear herein of record.

Wherefore the defendant prays that a writ of error may issue in his behalf out of the United States Supreme Court for the correction of errors so complained of and that a transcript of the record and proceedings in this case, duly authenticated may be sent the said United States Supreme Court.

HAROLD P. WILLIAMS,
United States Attorney,
By ALBERT F. WELSH,
Assistant U. S. Attorney.

Allowed: 4/3/25. E. H. B., D. J.

39 In United States District Court

Assignments of error

Filed April 3, 1925

Now comes Malcolm E. Nichols, the plaintiff in error, and in connection with his petition for a writ of error, says that in the record, proceedings, and in the final judgment aforesaid manifest error has intervened to the prejudice of the plaintiff in error, to wit:

1. The court erred in instructing the jury as requested by the defendant in error that the payment referred to in the first count of the declaration was exacted unlawfully.

2. The court erred in instructing the jury as requested by the defendant in error that the payment referred to in the second count of the declaration was exacted unlawfully.

3. The court erred in instructing the jury as requested by the defendant in error that upon all the evidence the plaintiffs are entitled to recover the sum of $36,799.38 with interest at six per cent. from June 8, 1923, to the date of the verdict.

4. The court erred in instructing the jury as requested by the defendant in error that the real estate referred to in the second count of the declaration was not a part of the "net estate" of Julia Coolidge within the meaning of the revenue act of 1918.

5. The court erred in instructing the jury as requested by the defendant in error that if the revenue act of 1918, according to its true construction, purports to authorize the exaction of the payment referred to in the first count of the declaration, it is to that extent void because not an exercise of any power granted to Congress by the Constitution of the United States.

6. The court erred in instructing the jury as requested by the defendant in error that if the revenue act of 1918, according to its true construction, purports to authorize the exaction of the payment referred to in the first count of the declaration, it is to that extent repugnant to sub-section 4 of section 9 of Article I of the Constitution of the United States.

7. The court erred in instructing the jury as requested by the defendant in error that if the revenue act of 1918, according to its true construction, purports to authorize the exaction of the payment referred to in the first count of the declaration, it is to that extent repugnant to the fifth amendment to the Constitution of the United States.

40 8. The court erred in failing and refusing to instruct the jury as requested by the plaintiff in error that section 402 (c) of the revenue act of 1918 is constitutional in its provision that there shall be included in the gross estate of a decedent dying after the passage of the act the value at the time of death of all interests in property, real or personal, tangible or intangible, wherever situated,

with respect to which the decedent has prior to the passage of the act created a trust or made a transfer intended to take effect in possession or enjoyment at or after the death of the decedent.

9. The court erred in failing and refusing to instruct the jury as requested by the plaintiff in error that the subsequent assignment by Julia Coolidge of her share of the income from and of her interest in the trust mentioned in the pleadings did not make it improper to include in her gross estate the value of the interest with respect to which she had previously created a trust intended to take effect at or after her death as set forth in the court's second instruction.

10. The court erred in failing and refusing to instruct the jury as requested by the plaintiff in error that the transfers of real estate to her children by Julia Coolidge in her lifetime were transfers intended to take effect in possession or enjoyment at or after her death within the meaning of the aforesaid act.

11. The court erred in failing and refusing to instruct the jury as requested by the plaintiff in error that the value to be included in the gross estate of Julia Coolidge under the provisions of the aforesaid act is the value as of the time of her death of the real estate transferred to her children and of the real estate and personalty transferred to the trustee.

12. The court erred in failing and refusing to instruct the jury as requested by the plaintiff in error that the findings of the commissioner as to the values of the interests to be included in the gross estate are prima facie correct and that there is no evidence in this case to overcome such prima facie showing.

41 13. The court erred in failing and refusing to instruct the jury as requested by the plaintiff in error that under the pleadings and evidence in this case the plaintiffs are not entitled to recover and the verdict must be for the defendant.

HAROLD P. WILLIAMS,
United States Attorney.
By ALBERT F. WELSH,
Assistant U. S. Attorney.

42-43 [Citation in usual form showing service on Harold J. Coolidge and Augustus P. Loring omitted in printing.]

44 [Clerk's certificate to foregoing transcript omitted in printing.]

D [Indorsement on cover:] File No. 31,091. Massachusetts, D. C. U. S. Term No. 393. Malcolm E. Nichols, collector of internal revenue of the United States, for the district of Massachusetts, plaintiff in error, vs. Harold J. Coolidge and Augustus P. Loring, executors of the will of Julia Coolidge. Filed April 28th, 1925. File No. 31,091.

INDEX

AUTHORITIES CITED

In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 88

MALCOLM E. NICHOLS, COLLECTOR OF INTERNAL Revenue of the United States for The District of Massachusetts, Plaintiff in Error

v.

HAROLD J. COOLIDGE AND AUGUSTUS P. LORING, Executors of The Will of Julia Coolidge

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IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR PLAINTIFF IN ERROR

OPINIONS OF THE COURT BELOW

The court below did not write an opinion, but its charge to the jury is reported in 4 F. (2d), 112, and is found in the Record at pages 19 to 28. This charge directed a verdict and is in effect the opinion of the court.

GROUNDS OF JURISDICTION

The judgment to be reviewed was entered by the District Court for the District of Massachusetts on April 3, 1925. (R. 8.) A writ of error was taken under Section 238 of the Judicial Code (ch. 231, 36 Stat. 1157) as it stood before the Act of February

13, 1925 (ch. 229, 43 Stat. 936), became effective May 13, 1925, on the ground that the case involves the construction or application of the Constitution of the United States and in it the constitutionality of a law of the United States is drawn in question.

THE QUESTIONS

This case presents the question of the proper construction of Section 402 (c) of the Revenue Act of 1918, as well as the question of the constitutionality of that section. The constitutional question relates to the power of Congress to include in the gross estate of a decedent, dying after the passage of the Act, a transfer or trusts intended to take effect in possession or enjoyment at or after death, made or created prior to the passage of the Act. The question of construction turns upon the meaning of the phrase "intended to take effect in possession or enjoyment at or after his death" as used in the said section and as applied to the particular trust and particular transfer disclosed by the facts of this case.

A third question is presented by the facts, but under the ruling of the court below it was not necessary to the decision and was not decided. This question is whether the trust property included in the gross estate should be valued as of the date of death or as of the date of the transfer.

STATEMENT

This action was instituted in the court below on February 7, 1924 (R. 2), by Harold J. Coolidge and Augustus P. Loring, executors of the will of Julia Coolidge, deceased, as plaintiffs, against Malcolm E. Nichols, Collector of Internal Revenue of the United States for the District of Massachusetts, to recover an additional Federal Estate Tax of $36,-799.37, together with interest thereon alleged to have been erroneously assessed and collected as a Federal Estate Tax imposed upon the transfer of the net estate of Julia Coolidge under the Revenue Act of 1918 and paid by the plaintiffs below under protest and duress. On April 12, 1924, the plaintiffs below filed, with leave of court, a substitute declaration (R. 4), to which the defendant below filed a general denial (R. 3). The case was tried on an agreed statement of facts, which is found in the Record at pages 8 to 17. The court directed a verdict in favor of the plaintiff below (R. 28), and upon the verdict (R. 7) judgment was entered in favor of the plaintiff below (R. 8). A writ of error to this Court was allowed on the third day of April, 1925. (R. 1, 28.)

From the stipulation of facts it appears that Julia Coolidge, a citizen of the United States and a resident of Brookline, Massachusetts, died on the sixth day of January, 1921. Her executors, in pursuance of the requirements of Section 404 of the Revenue Act of 1918, made return for Federal

Estate Tax purposes but did not include in this return the value of certain property which the decedent in her lifetime had conveyed to trustees and certain other property which in her lifetime the decedent had conveyed to her children. The Commissioner of Internal Revenue, upon review and audit of the return filed by the executors, determined that the value of the property so transferred should be included in the gross estate, and, accordingly, assessed the additional tax sued for in this case.

The two transactions in dispute are separate and distinct, and the first was as follows:

On July 29, 1907, the decedent and her husband, being then the owner each of certain property, transferred without consideration the said property to trustees, who upon the same day executed, acknowledged, and delivered a declaration of trust. (R. 9.) The terms of this trust require the trustees to distribute the income from the property to the husband and wife in proportion to their contributions of capital; that is, Julia Coolidge, the decedent, who contributed three-sevenths of the capital, was to be paid three-sevenths of the net income during her lifetime, and J. Randolph Coolidge, her husband, who contributed four-sevenths of the capital, was to be paid four-sevenths of the income during his life. The survivor was to receive the entire net income during his/her life. After the death of the survivor the corpus

was to be distributed equally amongst the five children of the founders of the trust or representatives of such of the children as might be then dead. Ten years after the founding of this trust and on April 6, 1917, the decedent and her husband assigned all their interest in the trust fund and their respective rights to receive the income therefrom to their five children. (R. 12.) The time for distribution of the corpus was not changed by this assignment.

Under these facts the Commissioner of Internal Revenue determined that the value of the property contributed by the decedent as of the date of her death should be included in her gross estate for the purpose of Federal Estate taxation. The executors dispute this determination on the grounds:

1. That although the trust as originally created was one intended to take effect in possession or enjoyment at or after decedent's death, the assignment of the decedent's life interest vested the possession and enjoyment prior to her death; and

2. That the trust having been created prior to the passage of the Revenue Act, the value of the property can not constitutionally be included in the decedent's gross estate, although the statute expressly requires that it shall be included.

The court below construed the statute to include this transaction, but held that so construed, the statute is invalid.

The other transaction, having no connection with the one above described, was as follows:

The decedent made another transfer by deeds dated May 18, 1917. (R. 13.) This transfer was without consideration and included two parcels of real estate in Massachusetts on which were dwellings occupied by the grantors. The two deeds purported to convey the absolute fee simple title to the decedent's five children. At the same time the deeds were executed the grantees executed leases to the decedent and her husband at an annual rental of one dollar for the term of one year, with a provision for the annual renewal of the lease unless notice to the contrary was given by either party. (R. 14.) The real understanding between the parties at the time these leases were executed was that should the lessees desire to continue to occupy the residences on the lessors' estates for the purposes of residing therein the leases would continue during the lifetime of the lessees or either of them, and to this extent the provision in the leases for termination by the lessors was inoperative. (R. 16, par. 14.) The lease provides that the lessees shall not be liable for waste and shall pay all expenses in connection with the properties.

Under these circumstances the Commissioner of Internal Revenue determined that the value of the properties transferred as of the date of the decedent's death should be included in her gross estate, because they were transfers intended to take effect in possession or enjoyment at or after her death. The plaintiffs contend that such inclusion is not

proper for the reasons (1) that the transfers were not intended to take effect in possession or enjoyment at or after the decedent's death, and (2) that, if they were, such transfers, having been made prior to the passage of the Revenue Act of 1918, although after the passage of the Revenue Act of 1916, could not constitutionally be included in the decedent's gross estate, despite the fact that the statute expressly provides that they shall be so included.

The court below held this transaction was not within the statute.

STATUTES INVOLVED

The Revenue Act of 1918, c. 18, 40 Stat. 1057, provides, so far as applicable to this case, as follows:

> SEC. 401. That (in lieu of the tax imposed by Title II of the Revenue Act of 1916, as amended, and in lieu of the tax imposed by Title IX of the Revenue Act of 1917) a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 403) is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or non-resident of the United States: * * * [Here follow the rates applicable.]
>
> SEC. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated * * *.

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title; * * *.

SPECIFICATION OF ASSIGNED ERRORS TO BE URGED

1. The court erred in directing the jury to return a verdict for the plaintiffs in the sum of $36,799.38 with interest at six per cent from June 8, 1923, to the date of the verdict. (R. 29.)

2. The court erred in holding that the real estate referred to in the second count of the declaration was not a part of the "net estate" of Julia Coolidge within the meaning of the Revenue Act of 1918 (R. 29), and that said transfers were not intended to take effect in possession or enjoyment at or after her death.

3. The court erred in holding that if the Revenue Act of 1918, according to its true construc-

tion, purports to authorize the exaction of the payment referred to in the first count of the declaration, it is to that extent void because not an exercise of any power granted to Congress by the Constitution of the United States (R. 29), and because it is to that extent repugnant to subsection 4 of section 9 of Article I of the Constitution of the United States (R. 29), and to the Fifth Amendment to the Constitution of the United States (R. 29).

SUMMARY OF THE ARGUMENT

The trust created by Mrs. Coolidge, as modified by the subsequent assignment of her life estate, is within the meaning of Section 402 (c) of the Revenue Act of 1918 because the words of that Act provide for the inclusion in the gross estate of the value of the interest which the decedent transferred without regard to that which she retained, if any. The test by which the propriety of including the property in the gross estate is determined is whether the actual possession or enjoyment of the property was deferred until at or after the donor's death.

This construction of the phrase "intended to take effect in possession or enjoyment at or after death" was a settled judicial construction long prior to the passage of the Revenue Act of 1918. The courts of many States in construing this phrase as used in State Inheritance Tax Laws had settled its construction, and it is to be presumed

that in using this phrase Congress intended that construction.

Moreover, both the purpose and spirit of the Act require that such trusts be included. Congress did not insert this provision relating to trusts intended to take effect in possession or enjoyment at or after death for the purpose of preventing evasions of the Act because the provision is made applicable to transactions completed prior to the time when such transactions involved any question of Federal taxation, nor did Congress include the creation of such trusts for the purpose of taxing transfers which took place at death. This is shown by the fact that it included other classes of property, for instance, gifts in contemplation of death, general powers of appointment, and receipts of insurance money which clearly were not transferred from the decedent at his death. What Congress intended was to provide a measure for the tax which would operate with equality upon all those who made testamentary dispositions of their property whether such dispositions were by will or intestacy or only in effect testamentary.

In the other transaction, the conveyance of real estate constituting the dwellings, the decedent retained a life interest, and the grantees were not intended to have either possession or enjoyment during the grantor's lifetime. Although the deeds were absolute on their faces and the leases by their terms were terminable by the lessor at the end of

any year, the true nature of the transaction is to be determined by reference to the collateral agreement and understanding between the parties. This understanding was that the grantor should have the use and possession of the property during her life. The agreement, conflicting with the terms of the lease, shows that the lease as drawn did not reflect the true agreement and was subject to reformation. Under such an agreement the grantor had possession and the grantees did not. The transfer is, therefore, clearly within the statute.

So construed, the Act is constitutional. The tax is an excise imposed not upon the transfer of the statutory gross estate but upon the transfer of the decedent's interest in such property as she actually owned at her death. The statute expressly so provides, for it imposes the tax upon the *transfer* of the *net estate of the decedent*, and this Court has held that the tax is imposed upon the cessation of the decedent's interest in property. Moreover, the occasion of all death duties is the transmission of a decedent's property and so far as transfers not occasioned by death are taxed by the States the imposition is attributable to the power to regulate rather than to the taxing power. The structure of the Federal Act shows that certain property which is included in the gross estate is not the occasion of the tax either directly or by reason of its transmission, for some unidentified part of the property included in the gross estate is excluded from the estate which gives rise to the tax.

The value of the gross estate is merely the measure of the tax and does not affect the constitutionality of the Act unless the measure is wholly arbitrary and unreasonable.

The measure adopted by Congress is a reasonable measure and has been so held by numerous courts on the theory that transactions such as that involved in this case are testamentary in effect, although not in form, and are, therefore, reasonably related to the occasion of the tax; that is, to the transmission of property by death. The power of Congress to impose an excise tax upon a past occasion or to measure an excise tax by a past occasion is unquestionable.

The tax imposed by Title IV of the Revenue Act of 1918 is an excise and not a direct tax. This Court has substantially so held. The tax is not imposed by reason of the general ownership of property or upon property. It is, therefore, not direct under the rule laid down by this Court in *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429. The provisions for the collection of the tax, although they impose a burden upon property, do not make the tax a direct tax.

ARGUMENT

I

THE TRUST CREATED BY THE DECEDENT IS WITHIN SECTION 402 (C) OF THE ACT WHEN THAT SECTION IS PROPERLY CONSTRUED

The court below held that the trust which the decedent created in 1907 was one intended to take effect in possession or enjoyment at or after her death, in spite of the fact that in April, 1917, she assigned all her interest in the trust property to the same five children who were (unless they or some of them died before the time of distribution) to enjoy and possess the corpus after her death. In so ruling the court followed the very words of the statute which provides that the property to be included is any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, intended to take effect in possession or enjoyment, at or after death.

The opposing view of the statute is that it was not intended to include any property with respect to which the decedent, in his life time, had parted with all interest.

Although Mrs. Coolidge transferred all her interest in the property involved in the trust, she adopted a vehicle by which the possession or enjoyment of the remainder interest (and that remainder interest is what the Commission included in the gross estate) was postponed until she died.

Until then the corpus was in the hands of others than those ultimately entitled to have it. The possession or enjoyment of the corpus was postponed since "possession or enjoyment" means the right to use, enjoy, and possess the property with all the legal as well as equitable attributes of ownership. The possession or enjoyment to which the statute refers is not a technical vesting but actual enjoyment. A life estate is one interest, a remainder is another interest, and the statute reaches "*any* interest," the possession or enjoyment of which is postponed until at or after death. (Sec. 402 (c).)

In dealing with this same phrase as used in the Federal Inheritance Tax Law of 1898 (Sec. 29, Act June 13, 1898, Ch. 448, 30 Stat. 448, 464, this Court said in the case of *Vanderbilt* v. *Eidman*, 196 U. S. 480, at page 491:

> It will be observed that the duties imposed in section 29 (of the Federal Inheritance Tax Law of 1898) have relation to two classes, first, legacies or distributive shares passing by death and arising from personal property; and, second, any personal property or interest therein transferred by deed, grant, bargain, sale or gift, to take effect in possession or enjoyment after the death of the grantor or bargainor, in favor of any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise. As to this second class, the statute specifically makes the liability for taxation depend, not upon the mere vesting in a technical sense

> of title to the gift, but upon the actual possession or enjoyment thereof. * * *

There is nothing unusual about the language used in the statute. It is the language commonly used to describe future estates. Its meaning is clear. "Estates in possession or enjoyment" are those which give their owner the right to use, enjoy, and have the *res* immediately. Those which are not in possession or enjoyment are in expectancy; that is, the owner is to have the possession or enjoyment of the *res* at some future time. The presumption is that Congress used ordinary language in its ordinary significance, and, therefore, that it intended in this section to include all property which a decedent in his lifetime transferred either to donees directly or to donees indirectly through a trustee, by such an instrument that the donees' immediate possession or enjoyment of the property so transferred was postponed until the donor's death.

In the case at bar the children, even after the assignment, lacked during their mother's lifetime in at least two important particulars such possession or enjoyment. They could not dispose of the trust property and they could not use it. They had the income but not the use or disposal. No one would for an instant contend that the right to farm a property, which is its use, is the same thing as the right to receive the income produced from the land when farmed by another. In one case the property

is in possession and enjoyment. In the other only the income is in possession or enjoyment. In the instant case the founder intended (and the intention is the test established by the statute) that the possession and enjoyment of the corpus of the trust fund should be postponed until after her death. The trust was created for the very purpose of preventing the beneficiaries from having control of the corpus until that time. It is only when the beneficiaries have the use and disposal of the property without reference to the time of the donor's death that the gift is not within the statutory language.

Re Waugh, 78 Pa. 436.

Re Morris, 1 Pa. Dist. Rep. 818.

In re Einstein, 114 Misc. 452, 186 N. Y. S. 931.

State Street Trust Company v. *Treas. & Rec'r Gen'l*, 209 Mass. 373.

In re Bottomley's Estate, 92 N. J. Eq. 202.

In re Fulham's Estate, 96 Vt. 308.

In re Egerton's Estate, 103 Misc. 471, 170, N. Y. S. 222.

The courts have generally construed the Federal statute in the same way.

Safe Deposit & Trust Co. v. *Tait*, 295 Fed. 429.

Mercantile Trust Co. v. *Hellmich* (not reported), T. D. 3545; 26 Treasury Decisions, Internal Revenue, 9.

Shukert v. *Allen*, 300 Fed. 754; aff'd 6 F. (2d) 551; cer. granted Oct. 19, 1925.

Stark, Ex'r. Schmidlapp v. *United States*, 14 F. (2d) 616.

McCaughn v. *Girard Trust Co.*, 11 F. (2d) 520.

Indeed this is the settled construction of the phrase "intended to take effect in possession or enjoyment at or after death." That phrase has long been used in inheritance tax statutes. It was used in the Federal Acts which preceded the Revenue Act of 1918. (See Revenue Act 1916, Act Sept. 8, 1916, Ch. 463, 39 Stat. 756, 777; Legacy Tax Act 1898, Sec. 29, Act June 13, 1898, ch. 448, 30 Stat. 448, 464; Revenue Act of 1862, Act of July 1, 1862, Ch. 119, 12 Stat. 433, 485.)

It has been used in State Inheritance and Estate Tax Acts for a hundred years. It has always been construed as including trusts such as the Coolidge trust, whether used in Acts imposing taxes on the right to receive (as in Massachusetts, see *Dana* v. *Dana*, 226 Mass. 297, 418), or in Acts imposing taxes on the right to transmit (as in New York, see *Keith* v. *Johnson*, 271 U. S. 1.)

Thus in the case of *Reish* v. *Com.*, 106 Pa. St. 521 (decided in Pennsylvania where the phrase originated in 1826). John Reish died on the 15th day of August, 1878. On the 10th day of August, 1878, he made a deed conveying all his property, real and personal, to his brother Isaac absolutely and unconditionally. At the same time Isaac executed a bond conditioned upon the payment to his brother during life of the income from the property

conveyed to him. The Act then in force provided in part that any real or personal property—

> transferred by deed, grant, bargain or sale, made, or intended to take effect, in possession or enjoyment, after the death of the grantor or bargainor, to any person or persons, etc., other than to or for the use of father, etc., shall be and they are hereby made subject to a tax or duty, etc.

The court said (p. 525):

> What was the effect of the writings made August 10th, 1878, so far as the charge for collateral inheritance tax is concerned? The deed and the bond were contemporaneous, the execution and delivery of both constituted a single transaction; the deed was absolute, it contained no condition, it was without reservation; but the bond, although in the form of a mere personal obligation, was in effect, we think, as regards the collateral inheritance tax, a postponement of the time of enjoyment, a reservation of the income and profits of the property, during the lifetime of the grantor.

Again in *State Street Trust Company* v. *Treas. & Rec'r Gen'l*, 209 Mass. 373 (a case involving a trust created, as is the one involved in the instant case, under the laws of Massachusetts), a donor created a trust to pay the income of the trust fund to named beneficiaries during the donor's life and at her death to pay the principal to those beneficiaries, or if she should be dead, to their appointees.

The court held that this trust was one intended to take effect in possession or enjoyment at the donor's death, saying (p. 378):

> If the income was payable to them [the beneficiaries], the intention of the settlor is plain, that the principal, even if it vested in title, was not to vest in possession and enjoyment during her life, and the defendants [the beneficiaries] have failed to bring themselves within this exception.

Again in *Matter of Dunlap*, 205 App. Div. 128, 199 N. Y. S. 147 (a New York case construing the New York law, which, like the Federal Law, imposes a tax on the right to transmit), it is held that a trust which provides that entire income should be paid to the grantor's four children in equal parts and the share of any beneficiary dying during the lifetime of the grantor should be paid to her issue, if any, surviving, and that on the death of the grantor the property should be distributed to the daughters in equal shares, was within the Statute. The possibility of reverter in the Dunlap case is also present in the instant case, for it might well be that all the Coolidge children would die without leaving issue and without leaving a surviving spouse before the death of the grantor. (Ch. 190, Sec. 3 (4), Gen. Laws of Mass. 1921.)

As further examples of transfers held to be postponed, although the donor reserved no interest in the property, see:

Re Jones Estate, 65 Misc. 121, 120 N. Y. S. 862.)

Re Patterson, 146 App. Div. 286 (N. Y.) 130 N. Y. S. 970.

New England Trust Co. v. *Abbott*, 205 Mass. 279.

People v. *Danks*, 289 Ill. 542.

In re Cruger, 54 App. Div. 405, aff'd. 166 N. Y. 602 (as to part of the income).

In re Bottomley's Estate, 92 N. J. Eq. 202.

In re Keeney, 194 N. Y. 281, aff'd. 222 U. S. 525 (as to three-fourths of the income).

In re Todd's Estate, 237 Pa. 466.

With this long-continued and harmonious judicial construction of the phrase before it, Congress used that phrase without qualification or change. It manifestly intended the phrase to have the meaning and effect given to it by those prior judicial decisions; otherwise it would have used other language.

The construction which the court below placed upon this phrase finds its justification not only in the letter of the statute and previous judicial utterances but also in the spirit of the Act and the purpose which Congress in using this well-defined phrase sought to accomplish. Its purpose was not to prevent evasions of the tax, for it applied it to transactions which were completed when there was no tax to be evaded. Nor was its purpose to tax transfers in trust on the theory that this class of gifts involved the transfer of some interest from

the dead to the living, for this phrase occurs in conjunction with other classes of property in some of which all the decedent's interest had ceased prior to death, i. e., gifts made in contemplation of death although two years prior thereto, and in some of which the decedent never had any interest, i. e., property passing under a general power of appointment exercised in prescribed modes by the decedent, and insurance money paid to beneficiaries other than the estate because of the decedent's death. Certainly these classes of property were not included in the gross estate for the purpose of taxing the transfer of decedent's property or interests in property. At his death he had no interest and there was no transfer.

In all the above cases Congress was seeking not the occasion for a tax but the measure for a tax. It was seeking, moreover, a measure which would be equitable and, in a practical sense, would result in an equal tax; that is, one equal not only with reference to what was given but also with reference to what was received. The measure adopted looks at the substance rather than the form and includes not only those transfers which are the technical result of testacy or intestacy but also those transfers which have practically the same effect as those made by will; that is, those transactions which are testamentary in character because they confer no practical benefit upon the beneficiary until the donor dies.

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That the trust involved in this case is, in that sense, testamentary in character, and thus within the purpose and spirit of the statute there can be no doubt. (*Keeney* v. *New York*, 222 U. S. 525.)

II

THE REAL ESTATE WHICH THE DECEDENT CONVEYED IS WITHIN SECTION (C) OF THE REVENUE ACT OF 1918, BECAUSE SHE RETAINED A LIFE INTEREST IN THE PROPERTY AND THE GRANTEES WERE NOT INTENDED TO HAVE EITHER POSSESSION OR ENJOYMENT DURING HER LIFETIME

The deeds which the decedent executed in 1917 conveying certain real estate to her children are absolute on their face, and the leases which were executed as part and parcel of the same transaction are, on their face, determinable at will by the lessors. Nevertheless, the transaction contemplated, and the parties so understood, that the deeds were not to operate absolutely and that the leases were not to be terminable, but, on the other hand, that the grantors should have, use, and enjoy the premises for their lives. (R. 16, par. 14.) The transaction amounted to the reservation by the grantors of a life estate in the premises.

The court below held that the transaction was not within the statute as he construed it. The fallacy of this view, it is submitted, is found in his statement at the bottom of p. 22 of the record, in which he proceeds on the theory that the lease, giving the lessors the right to cancel it at the end of

any year, was the only operative, valid arrangement. The stipulation of facts states that it was the understanding of the parties that the parents should retain the use and possession of the property so long as they, or either of them, lived. The terms of the written lease provided that the children could cancel the lease at the end of any year.

The court proceeded on the theory that the written provision in the lease was the only enforceable arrangement. In this he was manifestly in error. He overlooked entirely the doctrine of reformation of contracts. On the record as it stands, it is almost too plain for argument that the written lease in its cancellation provisions did not express the true agreement of the parties; that the true agreement was that the right of cancellation by the children was qualified by the understanding that the right should not be exercised so long as the parents might desire to use these dwellings for residential purposes, and if the children had attempted to cancel the lease under its terms while the parents desired to reside in the property, it being admitted, as the stipulation shows, that both parties to the lease had understood and agreed when it was made that the parents might enjoy the property during their lives for residential purposes, the parents could have resisted cancellation by asking the reformation of the lease to accord with the undisputed agreement.

The whole transaction shows on its face that the parents never intended to give their children the

right to throw them out of their home during their lifetimes, and the statute makes intention the controlling feature, namely, transfers and trusts "*intended* to take effect in possession or enjoyment at or after death." (Sec. 402 (c). See *Orvis' Estate*, 223 N. Y. 1.)

And in other similar cases the courts have had no difficulty in looking through the form of the transaction and including it for tax purposes if its true meaning and effect are to permit the grantor to use and enjoy the property for life.

As stated in the case of *People* v. *Shaffer*, 291 Ill. 142, 147:

> There can be no question, under the authorities, that if the actual intention of the parties to the deeds was that the possession and enjoyment of the land so conveyed thereby were to be postponed until grantor's death, the transfer of such lands is subject to the inheritance tax notwithstanding such evidence is not in writing, but can only be shown by parol. (Citing authorities.)

Matter of Jones, 65 Misc. Reports (N. Y.), 121, at page 123:

> * * * The deeds are absolute upon their face as to the title and immediate right of possession and enjoyment, and it is contended by the appellant that the intent as to the possession and beneficial enjoyment must be ascertained solely from the language of the deeds, and that the surrounding cir-

cumstances and intrinsic facts are immaterial.

I do not believe that the courts of our state have adopted such a rule for cases like this.

To the same effect see:

People v. *Porter,* 287 Ill. 401.
People v. *Moir,* 207 Ill. 180.
People v. *Burkhalter,* 247 Ill. 600.
Re Masury, 28 App. Div. 580, aff'd 159 N. Y. 532.
Matter of Ball, 161 App. Div. 79 (N. Y.).

The agreement, as distinguished from the apparent agreement, was that the grantors should have possession and enjoyment until death and that the grantees should not. The transfer is unquestionably within the statute. (*McCaughn* v. *Girard Trust Company,* 11 F. (2d) 520.)

III

THE REVENUE ACT OF 1918 SO CONSTRUED IS CONSTITUTIONAL.

1. *The tax is an excise imposed not upon the transfer of the statutory gross estate but upon the transfer of the decedent's interest in such property as he actually owned at the time of his death.*

This Court has said that the Federal Estate Tax is a tax imposed upon the transfer of a decedent's net estate; that the occasion of the tax is the cessation of his interest in property. The nature of the

tax as stated by this Court in *Young Men's Christian Association of Columbus, Ohio, v. Davis*, 264 U. S. 47, is as follows (p. 50):

> What was being imposed here was an excise upon the transfer of an estate upon death of the owner. It was not a tax upon succession and receipt of benefits under the law or the will. It was death duties as distinguished from a legacy or succession tax. What this law taxes is not the interest to which the legatees and devisees succeeded on death, but the interest which ceased by reason of the death. *Knowlton v. Moore*, 178 U. S. 41, 48, 49.

Neither the plaintiff in error nor the defendant in error attacks this description of the Federal Estate Tax, but starting from this fundamental conception of the tax the argument of the defendant in error departs from that of the Government in its conception not only of the "transfer" which is taxed but also of the property which composes the "net estate." The defendant in error bases his argument upon the conception that the transfer which is taxed is any transfer within the description of Section 402 of the Act, and that the net estate which is transferred is composed of the property described in Section 402, less the deductions described in Section 403. The Government, on the other hand, considers that, since the tax is upon the cessation of the decedent's interest in property and is occasioned by death, the transfer which occasions the tax is necessarily that transfer which takes

place at death, and that the "net estate," the transfer of which is taxed, is necessarily the decedent's property at the time of death. The "net estate" refers not to the property described in Section 402 of the statute but to the net estate as commonly understood—to the property and interests in property which the decedent actually owned at the time of his death above his liabilities.

Congress has no power to regulate the transfer of or succession to property, and therefore can not, as pointed out in *Knowlton* v. *Moore*, 178 U. S. 41, impose a tax upon the privilege of transferring property. The Federal imposition is an exercise of the Federal taxing power and is imposed upon a transmission of property by death. In construing the provision of the Federal Estate Tax Act it must be presumed that Congress intended to impose the tax upon a subject matter within its authority, and that, therefore, it intended to impose the Federal Estate Tax upon a transmission of property by death. It must likewise be presumed that since Section 402 describes transfers which are not occasioned by death and property which is not transmitted by death, that the purpose of Congress in putting this section into the Act was to provide a measure for the tax.

2. *Section 402 of the Act merely provides the measure of the tax, and the measure so provided is a reasonable measure.*

The transactions which afford the measure of the tax are specified in Section 402. The *value* of

the gross estate is to be *determined* by a statutory rule of values which may or may not conform to the facts. (See *Harder* v. *Irwin*, 285 Fed. 402.) The value of the gross estate thus determined and the resulting value of the net estate by which the amount of the tax is determined depend upon the statutory rule. The statute does not specify any particular property as being that constituting the net estate and does not indicate that any particular part of the property used in determining the value of the gross estate shall constitute or be included in the net estate. On the contrary, it clearly and by the terms used expressly negatives such an intention, for in determining the value of the net estate certain *amounts* are to be deducted under Section 403 from the value of the gross estate. For instance, the statute allows a deduction of "$50,000." Must a decedent have at the time of his death 50,000 actual dollars in order that this deduction may be taken? If not, then suppose a man makes a transfer of property worth when he dies $50,000 and this transfer is in contemplation of death, and having made such transfer he dies owning property worth $50,000. In such case the deduction does not take the property transferred in contemplation of death out of the estate. Again, since the statute provides for the deduction of the amount of the debts, etc., and not for the deduction of the property used to pay such charges, this deduction does not take any part of the transferred property out of the estate.

This construction is fortified by the fact that Congress did not use the time-honored form of expression which is, and has been, used repeatedly in statutes which do fix as the taxable occasion a transfer which does not take place at death but is nevertheless of a testamentary character. In substance such statutes provide that property which shall pass or vest by dower, courtesy, will, or by Statute of inheritance of this or any other State, or by deed * * * made in contemplation of the death of the grantor * * * or intended to take effect in possession or enjoyment after the death of the grantor * * * in trust or otherwise shall be taxed. The Federal statute, on the other hand, does not particularize the transfers which are taxed, but taxes generally and as a whole all transfers which are occasioned by the cessation of a decedent's interests in property at and by his death.

In framing Section 402 Congress has looked to the form and manner of the transfer and to the status arising at death as a result of either the ownership of property or its previous transfer. If on the whole the transaction has so resulted that it amounts substantially to a testamentary transfer, the value of the property affected is included in the measure of the tax. For the measure of a tax not only must result generally in equality of taxation, but also it must prevent generally an evasion of taxes. Congress in fixing the measure of this tax

has sought no less to have the same tax from estates in the same practical, though different technical, position than to prevent evasions. On this theory and for this purpose the provisions relating to the measure of the tax have been made to include transactions not in themselves taxable transactions. Congress has included in the measure certain classes of property with the transfer of which actual death has no connection and has excluded from the measure of the tax certain classes of property, the transfer of which is clearly taxable, e. g., $50,000 exemption; gifts to charity, moneys which pass to creditors, and property lost by casualty after death. It is thus quite apparent that the aim of Congress has been to include in the measure of the tax all that is necessary to make it operate with equality, having reference not solely to the property which a man keeps until he dies and then passes to his heirs, but as well to that property which he has disposed of in his lifetime in such a manner that his heirs benefit thereby when he dies.

If the measure bears a reasonable relation to the subject matter of the tax it is valid and can not be attacked under the Fifth Amendment.

License Tax Cases, 5 Wall. 462, 471.
United States v. *Singer*, 15 Wall. 111, 121.
Knowlton v. *Moore*, 178 U. S. 41, 57, 58.
Patton v. *Brady*, 184 U. S. 608, 619, 620, 622.
McCray v. *United States*, 195 U. S. 27, 59, 60, 63.

Flint v. *Stone Tracy Company,* 220 U. S. 107, 158.

Billings v. *United States,* 232 U. S. 261, 281, 282.

Brushaber v. *Union Pac. R. R. Co.,* 240 U. S. 1, 20, 24.

United States v. *Doremus,* 249 U. S. 86, 93.

The discretion which Congress exercises in fixing the measure of an excise is of wide latitude. The measure must be "wholly arbitrary and baseless" to be void. It must "inevitably" lead to the conclusion that the tax is not a tax at all but an attempt to confiscate property. It must be such a measure as can not in any view be sustained by reason. It is not enough that viewed from one aspect it is unreasonable. It must be so from every aspect. It must be *wholly* unreasonable.

So far eight courts have held the measure reasonable. (See *Safe Deposit & Trust Company* v. *Tait,* 295 Fed. 429; *Mercantile Trust Company* v. *Hellmich,* D. C. Eastern Mo. T. D. 3545, Vol. 26, Treasury Decisions, Internal Revenue, 9; *Cleveland Trust Company* v. *Routzahn,* 7 F. (2d) 483; *Reed* v. *Howbert,* 8 F. (2d) 641; *Congdon* v. *Lynch,* D. C. Minn., unreported, T. D. 3324, Vol. 24, Treasury Decisions, Internal Revenue, 735; *Shwab* v. *Doyle,* 269 Fed. 321; *Frew* v. *Bowers,* 9 F. (2d) 644 (Rev. C. C. A. 2d, 12 F. (2d) 625, petition for certiorari filed); *Stark, Exr. of Schmidlapp* v. *United States,* 14 F. (2d) 616.)

3. ***The measure is reasonable because the transactions which are included are testamentary in character.***

The measure adopted by Congress is not an arbitrary measure. There is a reasonably close relation between the occasion of the tax and its measure. Doubtless, considering the nature of the tax, it would be logical, since the tax is rested upon the cessation of the decedent's interests in property, to measure it by the value of the interest which ceased. This would, however, be a rule of difficult administration, depending in many instances upon the true construction of instruments, upon various contingencies affecting the decedent's ownership, and upon State laws. On the other hand, Congress would have the force of ancient precedent behind it if it had exacted a flat sum in every case, for this was the theory on which death duties were imposed in feudal times by means of "reliefs" and "*primer seizins.*" (Dos Passos, Inheritance Tax Law, 2d Ed., page 8.) The manifest inequality and hardship inherent in such a measure doubtless forbade its adoption.

Between these two extremes is a middle ground, which involves no practical difficulty of administration and which considers not only the rights of the decedent but also the rights of the heir, and provides not only for the prevention of evasions but also for the maintenance of equality between the man who substantially has made testamentary

disposition of his property before he dies and the man who actually makes a testamentary disposition of his property at the time he dies.

If it is argued that hardship may occasionally result from the measure adopted it may be answered by paraphrasing the language of Mr. Justice Holmes in *Lewellyn* v. *Frick*, 268 U. S. 238, that to impose a death duty which is *not* measured by past testamentary transfers is to impose an unexpected liability that, if known, might have induced those concerned to avoid it by making testamentary gifts of their property before the Act was passed. Moreover, the supposed hardship does not lead one to believe that a man who accomplishes a result by one means should be preferred as to taxation on that result over another who accomplishes the same result by other means. It is, therefore, no more than fair to increase the rate of tax upon the transfer of any estate which has been depleted of its property by quasi-testamentary transfers made prior to death.

A transfer *inter vivos* which deprives the donee of the use and enjoyment of the property given until the donor's death has great similarity to a testamentary gift. The distinctive feature of a testamentary disposition is this, it gratuitously confers a benefit which is enjoyable only at the death of the testator, until which time it is revocable. Assuming an irrevocable gift, is the fact that no practical benefit is conferred until death sufficient to associate such a gift with a transmission of prop-

erty by death for the purpose of affording a reasonable measure of a death duty?

The answer to this question is found in *Keeney* v. *New York*, 222 U. S. 525, where it is said (p. 535):

> Where the grantor makes a transfer of property to take effect on the death of a third person, it might, under the ruling in *Scholey* v. *Rew*, *supra*, be taxed as a devolution or succession. But under such an instrument the grantor does not retain the use and power during his own lifetime, the remainder does not fall in at his death, and such conveyances would not be so often resorted to as a means of evading the inheritance tax. 194 N. Y. 287. They are not so testamentary in effect as those transfers wherein the grantor provides that the property shall go to his children, or other beneficiary, at and after his death.

And in *Crocker* v. *Shaw*, 174 Mass. 266, it is said (p. 267):

> We see no difference in principle between property passing by a deed intended to take effect in possession or enjoyment on the death of the grantor and property passing by will. In either case it is the privilege of disposing of property after the death of the grantor or testator and of succeeding to it which is taxed, though the amount of the tax is determined by the value of the property.

In so far as the testamentary character of such a limitation is concerned, it makes no difference

whether the intervening life estate be reserved to the grantor or conveyed to another, since possession or enjoyment of the remainder is not had until the grantor's death (*State Street Trust Company* v. *Treas. & Rec'r Gen'l*, 209 Mass. 373), and it is the value of the remainder which is included in the gross estate.

The testamentary character of gifts which come into possession and enjoyment at or after death is further illustrated by those cases which hold that this change in possession is in itself a proper occasion for the imposition of a death duty. For example, the Finance Act, 1894, of England, Part 1, Section I, includes such transfers, and, commenting on it, Hanson says:

> The first condition essential in order that estate duty may be payable (under s. 1) on a death in respect of any property (as distinguished from any particular estate or interest in property) is the continuous existence of the property before and after the death. * * * The second condition is that the property must change hands at the death. The principle of the Finance Act, 1894, is that whenever property changes hands on death, the State is entitled to step in and take toll of the property as it passes. * * * (Hanson, Death Duties, 6th Ed. p. 80.)

To the same effect see *Wright* v. *Blakeslee*, 101 U. S. 174, and *Scholey* v. *Rew*, 23 Wall. 331.

It must be apparent that if a transaction of a certain kind is "testamentary in character" when

it takes place after a given date, it is also testamentary in character if it occur before that date unless the time of its happening fixes its character. The time when a transfer of the kind in question is made has nothing to do with its nature or effect. It is always a gratuity conferred by one upon another under such circumstances, conditions, or restrictions that the recipient does not receive the property until the donor dies. The donee may get an estate in the property before death and in this he is unlike a legatee. But he gets the property itself because of death, and in this he is like a legatee. As has been shown, this likeness has been held sufficient to classify such transfers as testamentary. If this likeness is sufficient to counterbalance the unlikeness in the event of a gift made after the Act, it, of course, is likewise sufficient in the event of a gift made before the Act. If it is fair and reasonable for Congress to increase the rate of tax when a gift has been made after the Act, it must be the same when the gift is made before the Act so long as the reason for the increase is that the result of the transfer is the same as a transfer by death. The theory of Congress is that a person who does not deplete his estate before death by testamentary gift must pay a tax on the transfer of the whole of his property, and that a person who makes such testamentary gifts in his lifetime must pay the same tax on his depleted estate, so that these two men who have in effect done the same thing shall be taxed alike.

When a transfer of the nature here considered is made, whether before or after the passage of the Act, the maker does not "voluntarily" subject himself to "the burden of the tax." (Charge below, Record, page 27.) The occasion of the tax is the transmission of the decedent's property at death. He "voluntarily subjected himself to" the tax when he dies the owner of property. The "privilege" of creating the trust or of otherwise making a testamentary disposition of his property in his lifetime is not the occasion of the Federal tax, whatever may be said on that subject as to taxes imposed by the several States. (*Knowlton v. Moore*, 178 U. S. 41.) It can make no difference in principle whether such privilege is exercised before or after the Act. Such transfers are not included because the decedent has exercised a privilege.

Whether it be said that death or the conveyance is the "generating source" (Charge below, Record, page 26) of the donee's possession or enjoyment (and it is clear that neither alone is such source), it is certain that until the donor dies the donee does not have possession or enjoyment, and in that respect is in a like situation with a legatee. Likewise, it is certain that so far as the donor is concerned he has accomplished his object of withholding from his beneficiary the benefit of the gift until after death. The succession is not complete until possession and enjoyment begin. (*Clapp* v.

Mason, 94 U. S. 589; *Mason* v. *Sargent*, 104 U. S. 689.)

The adoption of such a measure does not involve the levying of a tax upon the transfer of A's estate measured by the value of B's property. (Charge below, Record, page 26.) Congress has measured a tax on the transfer of property occasioned by and, therefore, effective at death by including transfers which are effective at death but not occasioned by it, so that the amount of the tax shall be the same whether the testamentary transfer was made before death or at death. The inclusion of this class of transfers does not increase the amount of tax over that which would have been due if the decedent had not taken advantage of the opportunity afforded him of making a testamentary gift before he died.

The contention that the measure is unreasonable amounts to this: It is unreasonable not to permit a man who has exercised the privilege of making a testamentary transfer in his lifetime to pay a less tax than is paid by one who has not exercised such privilege, and this although both men have practically, though not technically, done the same thing. The complete answer to this objection seems to be that taxes are properly, and indeed must be, imposed and measured by reason of the practical likeness of occasions or privileges regardless of legal and technical distinctions. (See *Southern Railroad Company* v. *Greene*, 216 U. S. 400, as explained and

commented on in *Flint* v. *Stone Tracy Company*, 220 U. S. 107. Also, *Nicol* v. *Ames*, 173 U. S. 509.)

4. *Apart from the question of construction, it makes no difference whether the taxable transfer is considered to be the grant intended to take effect in possession or enjoyment at or after death or to be the transfer of the decedent's own property by reason of death since a retroactive excise is constitutional.*

This distinction between the occasion of the tax and the measure of the tax is not necessary to sustain the validity of the tax. Congress has not attempted to do indirectly that which it could not do directly and to cover its lack of power by a name. There is no question of power involved. Congress can impose an excise upon a past transaction or it can measure the excise by such transaction. This is abundantly settled by the following cases:

In *Hylton* v. *United States*, 3 Dall. 171, a tax on carriages for the conveyance of persons for private use was upheld as a valid excise, although it was measured by carriages so kept on the fifth day of June, 1794, the day on which the law became effective.

In *Flint* v. *Stone Tracy Company*, 220 U. S. 107, a tax on the privilege of doing business in a corporate capacity was sustained, although the measure of the tax was in part income earned before the passage of the Act.

In *Washington Water Power Company* v. *United States*, 56 Ct. Cls. 76, the capital stock tax

imposed by Section 407 of the Revenue Act of 1916 with respect to carrying on or doing business by corporations measured by the fair average value of corporate stock for the preceding year was held valid.

In *Carbon Steel Company* v. *Lewellyn*, 251 U. S. 501, the munitions manufacturers' tax imposed by Section 301 of the Revenue Act of 1916 was held valid as an excise, although it applied to munitions manufactured and sold on contracts made in 1915.

In *Patton* v. *Brady*, 184 U. S. 608, an excise was imposed upon the manufacture and sale of certain articles, to wit, tobacco, and was measured by one-half the difference between the tax already paid (prior to the Act) and the tax imposed by the Act on a similar article.

In *Railroad Company* v. *Collector*, 100 U. S. 595, an excise tax upon the business of corporations was measured in part by interest on funded debt—an obligation assumed before the passage of the Act.

The last expression of this Court is found in the case of *Hecht* v. *Malley*, 265 U. S. 144, in which it is held that the Revenue Act of 1918 imposing an excise tax upon the privilege of doing business measured by the fair average value of the capital stock is constitutional, although it imposes a tax on the doing of business prior to the passage of the Act.

Mr. Justice Sanford, in writing the opinion of the Court, said (p. 164):

In view of the retroactive provision of the Act of 1918, we are of the opinion that taxes for the year ending June 30, 1919, can not now be recovered, even though originally their assessment under the Act of 1916 was unauthorized, since they thereafter became due under the Act of 1918; and that they may now be retained by the United States.

In *Stockdale* v. *The Insurance Companies*, 20 Wall. 323, it was held that the Income Tax Law of 1864 was an excise and was constitutional, although the measure of the tax was all the income of the previous year. It is interesting to note that in this case, as also in the *Patton case, supra*, the measure of the tax had been previously used to measure another excise tax.

The excess profits tax of October 3, 1917, is "essentially an excise tax," *Porter* v. *Lederer*, 267 Fed. 739, 740, and is constitutional, although measured by income earned prior to the passage of the Act. See also *Boss & Peake Automobile Co.* v. *United States*, 290 Fed. 167; *United States* v. *Updike*, 1 F. (2d) 550, affirmed 8 F. (2d), 913, certiorari denied April 19, 1926; *United States* v. *McHatton*, 266 Fed. 602.

In the case of *Penna. Company, etc.*, v. *Lederer*, 292 Fed. 629, it is held proper to measure an estate tax under the Revenue Act of 1918 by the value of property passing under a general power of appointment created before but executed after the passage of the Act.

In *Congdon* v. *Lynch* (D. C. Minn., unreported to date, T. D. 3324, Volume 24, Treasury Decisions, Internal Revenue, page 735), it was held that there was no constitutional objection to construing the provisions of the Revenue Act of 1916 so as to include a trust intended to take effect in possession or enjoyment at or after death, although the trust was created prior to the passage of the Act.

In *Shwab* v. *Doyle*, 269 Fed. 321, it is held that the Federal Estate Tax levied by the Act of 1916 was constitutional, although relating to transfers made prior to its passage. This case was reversed on another ground in 258 U. S. 529.

Perhaps the leading case on this subject is that of *Billings* v. *United States*, 232 U. S. 261. That case involved the construction of Section 37 of the Tariff Act of August 5, 1909 (Ch. 6, 36 Stat. 11, 112) laying a tax on the use of foreign-built yachts. The Act went into effect on August 6, 1909, and provided that the tax should be collected annually on the first day of September. It was insisted that it could not apply to the twelve months preceding the first day of September, 1909, as it would act retroactively for nearly an entire year. However, the Court held that Congress possessed the power to impose such retroactive tax and that the statute should be so construed to impose it. The fact that the privilege for using the yacht for the period preceding the passage of the Act had already been exercised was not supposed to have changed the tax

for that period into a direct tax nor to have made the measure unconstitutional.

In view of these authorities it is submitted that, in the words of this Court in *Stockdale* v. *Insurance Companies*, 20 Wall. 323, 331:

> The right of Congress to have imposed this tax by a new statute, although the measure of it was governed by the income of the past year, cannot be doubted * * *.

5. *The tax imposed by the Revenue Act of 1918, Title IV, is not a direct tax, although transfers made prior to its passage are involved, but is an excise.*

The importance of the distinction between imposing a tax upon a past occasion and measuring a tax by such occasion arises because under such a construction the controlling features of the Revenue Act of 1918 are the same as those of the 1916 Act. Under both statutes a tax was imposed upon any transmission of property at death after the passage of the Act measured by the value of property not owned or transferred by the decedent at the time of his death. The measure of the tax in both cases, when considered as of the time the tax attached (the date of death) included the value at the date of death of property previously transferred and vested in others than the decedent. Both involved the same hardship upon the residuary legatees or distributees of those estates which, for one reason or another, have after the transfer been denuded of much of the prop-

erty which the donor, at the time he made the transfer, expected and hoped such legatees or distributees would receive. Both involved the same possibility of hardship incident to measuring the tax by the value at the date of death rather than the value at the date of the transfer. Both involved a reference to "one man's property to determine the amount of another man's tax." In both cases the tax was "unavoidable."

These objections to the 1916 Act did not seem controlling to this Court in the case of *New York Trust Company* v. *Eisner*, 256 U. S. 345. Mr. Justice Holmes said (at page 349):

> It is argued that when the tax is on the privilege of receiving, the tax is indirect because it may be avoided, whereas here the tax is inevitable and therefore direct. But that matter also is disposed of by *Knowlton* v. *Moore*, not by an attempt to make some scientific distinction, which would be at least difficult, but on an interpreation of language by its traditional use—on the practical and historical ground that this kind of tax always has been regarded as the antithesis of a direct tax; "has ever been treated as a duty or excise, because of the particular occasion which gives rise to its levy."

The measure of the tax under the statute construed in the *Eisner case* did not include transactions completed prior to the passage of the Act. But the tax is no more or less inevitable when it is

measured by past transactions than it is when measured by subsequent transactions. In both cases the tax is inevitable because its generating source is death. It is true of all death duties, however measured, that they are unavoidable. The owner of property may destroy it and thus escape the tax, but such chimerical possibility is hardly such an election as would influence a court in determining whether such a tax is direct or indirect. However this may be, it is certain that the decedent in this case had exactly the same opportunity of avoiding the tax as did the decedent in the *Eisner case, supra*. She did not avoid it; she died the owner of property which was transmitted by her death. Upon this transmission a tax was imposed by a Federal statute. That tax is measured by the value of certain property which the decedent did not own at her death or after the Act was passed. Consequently the decedent could not avoid or change the measure. However, such inability would not seem to determine either the nature of the tax or its validity. (*Bass, Ratcliffe & Gretton* v. *State Tax Com'n.*, 266 U. S. 271, 284.)

Moreover, a tax which is unavoidable is not necesssarily a direct tax. The cases of *Thomas* v. *United States*, 192 U. S. 363; *Flint* v. *Stone Tracy Company*, 220 U. S. 107; and *Pollock* v. *Farmers' Loan & Trust Company*, 157 U. S. 429, 558, are not to the contrary. These cases hold that a tax which is avoidable is not a direct tax. The converse is not

necessarily true, for a tax which is unavoidable may be either a direct tax or an indirect tax. It is a direct tax if the occasion which gives rise to it is the ownership of property. It is indirect if the occasion which gives rise to it is the happening of an event. These principles were established in *Pollock* v. *Farmers' Loan & Trust Company,* 157 U. S. 429; 158 U. S. 601; as explained in *Knowlton* v. *Moore,* 178 U. S. 41, and *Brushaber* v. *Union Pac. R. R. Co.,* 240 U. S. 1, 20.

In the *Pollock case, supra,* it is determined that direct taxes are capitation taxes and taxes upon real estate (and personalty) *eo nomine,* or upon its owners in respect thereof, and that there is no "distinction between the real estate itself or its owners in respect of it and the rents or income coming to the owners as the natural and ordinary incidents of their ownership." (157 U. S. 580.) A "death duty," therefore, is not a direct tax, although it is unavoidable, for there is no right to transfer (or receive) property by reason of a death attached to the ownership of property as one of its "natural and ordinary incidents." And this is true whether the transfer (or receipt) be accomplished by virtue of a will, the intestate law, the laws of descent, or the creation of a technical future estate by deed *inter vivos.*

Keeney v. *New York,* 222 U S. 525.

Cole v. *Nickel,* 43 Nev. 12, affirmed 256 U. S. 222.

The tax does not become a direct tax on property because it is a charge against and payable out of property. All taxes are necessarily so paid, and provisions looking to the enforcement of the tax do not determine its character. As the Court said in *Scholey* v. *Rew,* 23 Wall. 331, 347:

> * * * nor is the question affected in the least by the fact that the tax or duty is made a lien upon the land, as the lien is merely an appropriate regulation to secure the collection of the exaction.

There is nothing to indicate that Congress intended to impose or, in fact, imposed one kind of a tax when paid by the executor and another kind when paid otherwise. The sections relating to payment and collection do not concern or modify the section imposing the tax. They are merely details for the effectual and practical operation of the law.

Flint v. *Stone Tracy Company,* 220 U. S. 107, 173.

In re Inman's Estate, 101 Oregon, 182.

The provisions relating to the collection and payment of the tax relate to property gratuitously transferred and to donees. Manifestly, Congress has a right to prevent any person from disposing of any property gratuitously unless provision is made for taxes. In fact, Congress has in the past done more than this. It has made claims for taxes prior to the claims of *bona fide* purchasers and mortgagees who took without notice.

Revised Statutes, Section 3186, before amendment.

Osterberg v. *Union Trust Company*, 93 U. S. 424.

Blacklock v. *United States*, 208 U. S. 75.

United States v. *Curry*, 201 Fed. 371.

Clearly such a provision is no more than a "detail deemed proper for the effectual operation of the law." When it is considered that these provisions relate to gratuitous takers and not to purchasers it would seem not only reasonable but highly proper to protect the Government's interest at the expense of the beneficiaries, for they are not thereby deprived of their earnings.

It is submitted that Congress, no less than the States, can avoid voluntary conveyances which operate to deprive the Government of its power to collect its taxes, if, indeed, such conveyances can not be avoided in the absence of any statute upon well-settled principles of law. For instance, a stockholder who receives a liquidating dividend from a corporation prior to the passage of a Taxing Act is liable to the extent of assets so received to pay a tax subsequently imposed upon the dissolved corporation.

Boss & Peake Automobile Co. v. *United States*, 290 Fed. 167, affirming 285 Fed. 410.

United States v. *McHatton*, 266 Fed. 602.

United States v. *Updike*, 1 F. (2d) 550; aff'd 8 F. (2d) 913; certiorari denied April 19, 1926, 46 Sup. Ct. Rep. 473.

CONCLUSION

The lower court committed error in holding that the Act was unconstitutional as applied to the creation by Mrs. Coolidge of the trust involved in this case. Also the court erred in holding that the transfer of real estate was not within the proper construction of the Act, and for these reasons its judgment should be reversed.

Respectfully submitted.

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December, 1926.

CONCLUSION

For the reasons hereinbefore stated, it is submitted that the defense [illegible] of [illegible] to the [illegible] sion by Miss Claridge of the issue [illegible] in this case. Also, the court erred in holding that the transfer of real estate was not within the proper construction of the Act, and for these reasons the judgment should be reversed.

Respectfully submitted,

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December, 1936.

Supreme Court of the United States

OCTOBER TERM, [illegible]

No. [illegible]

MALCOLM E. NICHOLS, COLLECTOR OF INTERNAL REVENUE,
Plaintiff in Error,

v.

HAROLD J. COOLIDGE and AUGUSTUS P. LORING,
EXECUTORS OF THE WILL OF JULIA COOLIDGE

BRIEF FOR THE DEFENDANTS IN ERROR

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[illegible]

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Supreme Court of the United States

OCTOBER TERM, 1926

[No. 88]

MALCOLM E. NICHOLS, COLLECTOR OF INTERNAL REVENUE, *Plaintiff in Error*,

v.

HAROLD J. COOLIDGE AND AUGUSTUS P. LORING, EXECUTORS OF THE WILL OF JULIA COOLIDGE

BRIEF FOR THE DEFENDANTS IN ERROR

This action was brought in the District Court for the District of Massachusetts against Malcolm E. Nichols (now plaintiff in error) to recover the sum of $36,799.38 exacted by him as collector of internal revenue from the executors of the will of Julia Coolidge (now defendants in error) and paid under protest. The amount so exacted represented an additional estate tax which was assessed by the Commissioner of Internal Revenue under color of the Revenue Act of 1918 as the result of including in the "gross estate" (1) the value of certain property transferred by the deceased (who was a resident of Massachusetts and who died January 6, 1921) to trustees in 1907, and (2) the value of two parcels of real estate conveyed by her to her sons in 1917. The Commissioner assessed this additional tax on the ground that the transfer to the trustees and the conveyance to the sons were intended to take effect in possession or enjoyment at or

after the death of Mrs. Coolidge, and so came within § 402 (c) of the statute, which reads as follows:—

> "Sec. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> . . . .
>
> "(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this act), except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title."

At the trial (which was before Judge Brewster and a jury) it was agreed that certain facts might be treated as in evidence without further proof (R. 8). No other evidence was offered by either party, and each party requested the direction of a verdict (R. 17–19). Subject to the collector's exception, the judge instructed the jury to find for the executors in the sum of $40,417.98 (being the sum paid as above stated, with interest), and a verdict was returned accordingly (R. 7–28). The judge's reasons for thus directing a verdict are stated at length in the charge, which is set out in the bill of exceptions (R. 19–28) and is reported in 4 Fed. (2d) 112. He ruled, among other things, that the real estate above mentioned was not a part of the "gross estate" within the meaning of the Revenue Act of 1918 and that, in so

far as the act purported to authorize the inclusion of the trust property in the "gross estate", it was void because not an exercise of any power granted to Congress by the Constitution (R. 27). On April 3, 1925, judgment was entered in favor of the executors (R. 8). Since this was prior to the taking effect of the so-called Jurisdictional Act of February 13, 1925, the case was brought to this court by direct writ of error under §238 of the Judicial Code.

The Transfer to Trustees

On July 29, 1907, the decedent Julia Coolidge and her husband, each in his or her own right, transferred certain real estate and personal property, without consideration, to trustees who executed on the same day a declaration of trust providing that the net income should be paid to Julia Coolidge and her husband, three-sevenths to the former and four-sevenths to the latter, during their joint lives, that after the death of one the entire income should be paid to the survivor, that after the death of the survivor the trust property should be transferred in equal shares to their five sons and that, if any of the sons should have died before the survivor of the parents, his share should be paid to those entitled to take his intestate property under the statute of distributions, then in effect, except that a surviving widow should not take more than one-half of such share (R. 9–10). Of the property thus transferred to the trustees, the decedent furnished substantially three-sevenths and her husband four-sevenths (R. 11).

On April 6, 1917, Julia Coolidge and her husband executed and delivered an assignment to the same five sons of all their interest in the trust fund and all their right to receive the income therefrom; by the terms of the assignment, the trustees were directed thereafter to pay over the income to the five sons (R. 12).

The Conveyance of the Real Estate

By deeds dated May 18, 1917, Julia Coolidge conveyed to her five sons, by way of gift, two parcels of real estate, one in Boston and one in Brookline, Massachusetts, and the deeds were at once recorded in the proper registries of deeds. At the same time the sons executed and delivered to their parents a lease of each of these parcels of real estate, the leases being identical in all material respects except as to the description of the property (R. 13-16). Each lease was for the term of one year, reserved a rental at the annual rate of one dollar and "contained the usual covenants found in the form commonly used in Massachusetts" (R. 20). The leases provided for forfeiture by the lessees for breach of covenant, and contained this clause (R. 15):—

> "This lease shall be taken to be renewed for the term of one year from the end of the specified term, and thereafter shall be taken to be renewed from year to year unless written notice is given by either party to the contrary at least one month before the end of the original term or any renewal thereof."

Both parcels of real estate had been owned by the decedent for many years and had been occupied by her and her husband as places of residence. "When the aforesaid leases were made it was understood by the parties that, should the lessees desire to continue to occupy the residences on the leased estates for the purpose of residing therein themselves, the leases would continue to be renewed from year to year during the lifetime of the lessees or either one of them" (R. 16).

The Assessment of the Estate Tax

The defendants in error, as executors of the will of Julia Coolidge made a return of the value of her estate as required by the Revenue Act of 1918, without including

the property conveyed to trustees as aforesaid or the real estate above referred to. According to this return, the gross estate amounted to $180,184.73 and the net estate to something over $102,000 (R. 8).

Upon a review and audit of the return, the Commissioner of Internal Revenue increased the gross estate "by adding thereto the value as of the date of death of Julia Coolidge (which value was $432,155.35) of that part of the trust property which was furnished by her as aforesaid, although as a result of changes in investments, etc., much of that property was no longer held by the trustees in specie at the time of her death" (R. 13); and "by adding thereto the value as of the date of the decedent's death of the two parcels of real estate above mentioned," the value being $274,300 (R. 16).

The inclusion of these items in the gross estate led to the assessment of an additional tax in the sum of $34,662.65 which, together with interest thereon amounting to $2,136.73, the defendants in error paid "under written protest and under duress" (R. 16).

If the property transferred to the trustees had been included in the gross estate and the two parcels of real estate had been omitted, the additional tax would have been $18,106.60. If the two parcels of real estate had been included and the trust property excluded, the additional tax would have been $9,507.03 (R. 17).

Judge Brewster's Rulings

The Government did not claim that either the transfer to the trustees or the conveyance of the real estate was made in contemplation of death (R. 22).

Judge Brewster ruled (1) that the conveyance of the real estate was not a transfer "intended to take effect in possession or enjoyment at or after" the death of the grantor and so was not within the purview of the statute

and that the Commissioner of Internal Revenue was, therefore, without authority to include its value in the gross estate (R. 22-23); (2) that, the transfer to the trustees was a transfer such as is described in the statute, but that, as Mrs. Coolidge had parted with all interest in the property before the passage of the act it is unconstitutional in so far as it purports to authorize the inclusion in the gross estate of the property transferred to the trustees (R. 23-27).

ARGUMENT

The executors submit that the judgment of the District Court should be affirmed for the following reasons:

I. The judge rightly ruled that the conveyances of real estate were not within the scope of the statute.

II. The trust property was wrongly included in the "gross estate" for—

1. The trust did not take effect in possession or enjoyment within the true meaning of the statute at or after Mrs. Coolidge's death;

2. If the Revenue Act of 1918 according to its true construction purports to authorize the exaction imposed with respect to the trust property, it is unconstitutional.

I.

The Judge rightly ruled that the Conveyances of Real Estate were not within the Scope of the Statute.

Inasmuch as each party requested a directed verdict, it is unnecessary to inquire whether, if the case had been submitted to the jury, a verdict for the defendant upon this branch of the case would have been warranted. The sole question is whether the judge was bound to rule that, as matter of law, the real estate constituted a part of the "gross estate."

Williams v. *Vreeland*, 250 U. S. 295.
Sena v. *American Turquoise Co.*, 220 U. S. 497.
Empire Cattle Co. v. *Atchison, Topeka & Santa Fe Ry. Co.*, 210 U. S. 1.
Beuttell v. *Magone*, 157 U. S. 154.

I. In including the real estate in the "gross estate," the commissioner proceeded on the assumption that, notwithstanding the form of the transaction, a life estate was in effect reserved by the grantor. There is no claim that the real estate was conveyed "in contemplation of death," the Government's contention being, as the executors understand it, that there was a transfer to take effect at or after Mrs. Coolidge's death because it was expected, at the time the property was conveyed, that she and her husband would continue their occupancy as long as they might wish. Neither is it pretended that the conveyances were merely colorable or designed to evade payment of the estate tax. It is, nevertheless, asserted in the brief for the plaintiff in error that "the real understanding between the parties at the time these leases were executed was that, should the lessees desire to occupy the residences on the lessors' estates for the purposes of residing therein, the leases would continue during the lifetime of the lessees or either of them, *and to this extent the provision in the leases for termination was inoperative*" (p. 6; italics are ours) and that "the transaction contemplated, and the parties so understood, that the deeds were not to operate absolutely and that the leases were not to be terminable, but, on the other hand, that the grantors should have, use and enjoy the premises for their lives" (p. 22). These assertions are based solely on the passage in the agreed statement of facts which recites that, when the leases were made, it was "*understood* by the parties that, should the lessees desire to occupy the residences on the leased estates for the purpose of residing therein themselves, the leases

would continue to be renewed from year to year during the lifetime of the lessees or either of them" (R. 16; italics are ours). The word "understood" is manifestly insufficient as a foundation for assertions of this kind; while an agreement meant to be binding is sometimes described as an "understanding," this is not the ordinary meaning of the word, which, as has often been held, refers normally to an interchange of ideas not intended to be of legal efficacy and too vague to be a basis of legal proceedings in any event.

In *Camp* v. *Waring*, 25 Conn. 520, the question was as to the significance of a finding by a committee to the effect that there was in connection with a sale of real estate an "understanding" that the mortgage on the property "might remain unpaid for a number of years at least." It was held that this finding would not support a prayer for the reformation of the deed. The court said (at page 529):—

> "On a just construction of the report of the committee, we think that it is not found, as it should have been, affirmatively, if the fact was so, that it formed one of the terms of the agreement between the parties. Without taking time to comment at large on the language of the report, we think that, taking it all together, its fair import is, not that the parties intended to incorporate into their contract any positive or definite stipulation, by which either of them should be absolutely bound, as to the time for which payment by the plaintiff of the debt due to Mrs. Smith should or might be deferred, but only that what passed, in the negotiation which preceded and led to the contract, produced a mere expectation or belief that the debt would be suffered to lie for a number of years at least, unless enforced by Mrs. Smith. This construction or inference seems to be irresistible when we look at the precise terms in which it is stated that the parties 'agreed' in regard to the payment of that debt, in connection with the subsequent explicit finding,

as to certain points in regard to the delay of its payment, that there was no agreement between them, and the significant manner in which it is subjoined what the "understanding" was, in regard to that debt being permitted to lie. The context here shows that the word "understanding," always a loose and ambiguous one, unless accompanied with some expression to show that it constituted a meeting of the minds of parties upon something respecting which they intended to be bound, was used, not to express anything which was the subject of an agreement or contract between the parties, but only that kind of expectation or confidence upon which parties are frequently willing to rely without requiring any binding stipulation."

To the same effect are—

Tillman v. *Ogren*, 227 N. Y. 495.
Williams v. *Yazoo & Mississippi Valley Railroad*, 82 Miss. 659.
Black v. *Columbia*, 19 So. Car. 412.

There is nothing here to show that the word is used in any different sense. Even if the "understanding," however, had risen to the level of an agreement, it would have been unenforcible under the Statute of Frauds.

Mathews v. *Carlton*, 189 Mass. 285.
White v. *Wieland*, 109 Mass. 291.

The existence of an arrangement whereby no enforcible rights are reserved to the grantor and whereby his use of the property is, as in the present case, wholly dependent on the good will of the grantee, does not render the transfer one taking effect in possession or enjoyment at the grantor's death.

Matter of Hendricks, 163 App. Div. 413; affirmed 214 N. Y. 663.

Not only were the grantees at liberty to terminate the leases and enter into physical occupancy at the close of

any annual period, but, if they had sold the property,—as they were free to do at any time,—the purchaser would have had only to give the notice provided for in the leases (R. 15), in order to be entitled to eject the tenants at the close of the current year.

In *Matter of Jones*, 65 Misc. (N. Y.) 121, cited by the government, the deeds were retained by the grantor and were not recorded until after his death; throughout his life he continued not only to occupy the property but to deal with it as his own in all respects, retaining the income produced by it for himself. The facts in *People v. Shaffer*, 291 Ill. 142, were similar; the grantor seems even to have gone so far as to lease the property in his own name. These and the other cases cited on page 25 of the brief for the plaintiff in error merely show that the delivery of a deed of land by way of subterfuge to avoid taxation, where it is agreed that it is not in reality to take effect until the death of the grantor and where the latter remains in possession and exercises all the rights of ownership just as before, will not avail to prevent the inclusion of the property in the taxable estate of the grantor.

In the case at bar the transaction was in no sense a subterfuge. The deeds were delivered absolutely and were promptly recorded. The grantees could at once have sold the property, subject to one-year leases. The expectation then entertained by both parties that they would not do so, but would renew the leases, is, it is submitted, immaterial. The property was residential and produced no income. The grantors, by causing the deeds to be recorded and by accepting the leases, acknowledged in the most formal way that the property was not theirs and put it out of their power to deal with it as such. The reasoning of the District Court on this branch of the case is, the executors submit, unanswerable (R. 22):—

"The deeds conveyed, with warranty covenants, absolute and indefeasible title to the real estate without any valid reservations, conditions or restrictions whatsoever.

"The leases, executed the same day, were for one year or any renewal thereof but were always subject to the right in the lessors to terminate the term during any year by giving the notice as therein provided. It is conceded that the parties contemplated that the premises would be enjoyed by the decedent and her husband so long as they might desire to use them for residential purposes, but the decedent had no valid agreement to that effect. Her rights must be held to be governed by the term of the lease. If it could be said that the grantee did not come into full possession and enjoyment of the estate at the time of the conveyances,—and I am inclined to the opinion that they did,—their right to come into full possession did not depend in the slightest degree upon the death of the grantor. The effect of this transaction was to vest in the five sons named in the deed full and complete title to the property including the right of disposition. They had a right to sell the property subject to the lease and had all rights incident to ownership. There was here a gift completed during the lifetime of the donor. The act of 1918 did not purport to tax such gifts."

In any event, the agreed facts certainly do not go to the extent of requiring a ruling as matter of law that the real estate should be included in the "gross estate; therefore the conclusion of the court below must stand.

In the brief for the plaintiff in error (p. 23), it is said that "the court proceeded on the theory that the written provision in the lease was the only enforcible arrangement" and that "in this he was manifestly in error," because "he overlooked entirely the doctrine of reformation of contracts." The simple reason why the point was not dealt with by Judge Brewster is that no such preposterous suggestion was made in the court below. There is not a scintilla of evidence to the effect that the

deeds and leases were executed through any mistake either of law or of fact and it is superfluous to point out that, while the existence of a mistake is by no means always a ground for reformation, there cannot, on any theory, be reformation if the parties were correctly informed as to the facts and if the documents have the precise legal effect which was intended. Moreover, even if Mrs. Coolidge had not been content,—as plainly she was,—to rely wholly upon the good will of her sons as to her occupancy of the property and had obtained from them something rising to the dignity of an agreement that she should continue to occupy during her life, a refusal by the sons to carry out this agreement and an insistence by them on the rights given them by the deeds and leases would have conferred upon Mrs. Coolidge no right to have the instruments reformed, whatever right of action she might have had for breach of the agreement. Failure to perform an oral agreement collateral to a written contract,—even though it be an agreement not to exercise the rights which the contract purports to create,—is never a ground for reformation.

In *Brosnihan* v. *Brosnihan*, 180 Wis. 360, the facts were practically identical with those assumed by the Government in the case at bar. The court said (at page 364):—

"Does the situation so presented appeal to a court of equity so as to move it to order and adjudge the prayer for reformation, and is it within the province of a court of equity to afford relief under such circumstances? The parties dealt with each other at arm's length. From the standpoint of intelligence they must be deemed upon an equal footing. The transaction itself was not complicated but extremely simple. The absence of the required provisions was within the knowledge of both, and neither even suggested that anything had been omitted from the document or that they were to be inserted. The defendant relied upon the oral promise of her brother, and not upon

any agreement, stipulation, or reservation in the document itself. Under the evidence there was neither a mutual mistake of fact nor of law. The relief granted by the lower court, therefore, is such as neither of the parties contemplated and amounts to the making of a new contract, which the lower court, in the exercise of its equitable jurisdiction, had no power to award and which this court cannot grant."

To the same effect are—

Wilson v. *Deen*, 74 N. Y. 531.
Brintnall v. *Briggs*, 87 Iowa, 538.
Smith v. *Rust*, 112 Ill. App. 84.
Comerford v. *United States Fidelity & Guaranty Co.*, 59 Mont. 243.
Pickrell & Craig Co. v. *Bollinger-Babbage Co.*, 204 Ky. 314.

2. The position of the Government as to this branch of the case is, in any event, no stronger than it would be if the decedent had granted to the sons vested remainders in the real estate after life estates reserved to herself. If this had been true, the case would have presented the question which has been much discussed in the lower federal courts as to whether a transfer whereby there is created a vested remainder after a life estate reserved by the grantor takes effect in possession or enjoyment within the meaning of the statute at his death or at the time of the delivery of the instrument. The executors submit that the latter is the true construction of the statute, as has recently been held by the Court of Claims and by the Circuit Court of Appeals for the Second Circuit.

Arnold v. *United States*, 62 Ct. Cl.—(June 14, 1926).
Miller v. *United States* 62 Ct. Cl.—(June 14, 1926).
Frew v. *Bowers*, 12 Fed. (2d) 625.

In the case last cited the court said (at p. 627):—

"What is meant by the phrase 'take effect in possession or enjoyment at or after' the death of the trust creator? The natural inclination of every lawyer is to recognize that 'take effect' is not a phrase of art, to search for some artistic equivalent, and find it in the word 'vest.' But if, as the result of a passage of title the passing estate is vested, whether in fee, for life, in remainder, or in reversion, even though subject to divestment by subsequent event, then the transfer is complete, and so is the 'possession or enjoyment,' for one 'possesses and enjoys' a reversion as thoroughly as he does a fee, even though most men prefer a fee to a reversion.

"But if the transfer of an estate results in the immediate vesting thereof, and of each and every part of the same, the transaction is complete, and the grantor or transferor has no 'interest' left therein; wherefore on his death there can be found no such 'interest' to include in his gross estate.

. . . .

"We must first decide whether, within the meaning of the statute, Mr. Nash at the moment of his death had any *interest*, within the meaning of the act; we incline to hold that the applicable words should be treated technically, and that therefore there was no *interest* left from or arising out of the gift completed in 1910."

It follows from this reasoning that the action of the commissioner with respect to the real estate could not be sustained, even if his interpretation of the facts were correct.

II.

The Trust Property was wrongly included in the "Gross Estate."

1. THE TRUST DID NOT TAKE EFFECT IN POSSESSION OR ENJOYMENT WITHIN THE TRUE MEANING OF THE STATUTE AT OR AFTER MRS. COOLIDGE'S DEATH.

The District Court ruled that the interests of those whose shares in the trust property were subject to Mrs. Coolidge's life estate must be regarded as taking effect in possession and enjoyment at her death. If, as the executors submit, this ruling was wrong, the constitutional question becomes immaterial, since the reasons given for a decision are of no consequence if the decision itself is right.

Sullivan v. *Iron Silver Mining Co.*, 143 U. S. 431.

Wisner v. *Brown*, 122 U. S. 214.

(a) After 1917 Mrs. Coolidge had no interest whatever in the Trust Property.

The remainders created by the trust instrument as originally drawn were not contingent, but were vested, subject with respect to any particular remainderman to being divested in case he should die before the life estates fell in.

Blanchard v. *Blanchard*, 1 Allen, 223.

The case does not turn, however, simply on the fact that the remainders had become vested prior to the establishment of any estate tax, since the operation of the statute is vitally affected by the assignment. The effect of this assignment was to divest the settlors of all interest in the trust and to vest in the sons the entire beneficial interest. Each son, after the assignment, had an

equitable estate *pur autre vie* for the lives of the settlors, followed by an equitable remainder in fee. All that prevented the arrangement from becoming a mere dry trust, so as to entitle the sons to call for the immediate conveyance of the legal title, was the possibility that a son might die while one or both of the parents survived, in which event his next of kin were to take his share. Upon Mrs. Coolidge's death nothing moved from her or her estate and no interest theretofore enjoyed by her ceased. Her death had no effect whatever upon the trust property except as it affected the relation of third persons to it.

In view of the assignment the original transfer of 1907 is to be dealt with as if it had itself divested the grantors of all interest in the property. In this respect the case is like *Brown* v. *Gulliford*, 181 Iowa, 897, in which the court said (at p. 901):—

> "Though the deed, by reserving a life estate, worked liability to the tax, all this could be changed by terminating the reserved estate in the lifetime of the grantor and changing the grant by adding to [the] remainder the right to immediate possession and enjoyment."

The death of the grantors was to have no effect on the title except as terminating an element of uncertainty in the rights of the beneficiaries *inter sese*. If it had been provided that that element of uncertainty should be terminated upon some other event, such as the death of a third person, there would, even upon the Government's construction of the statute, be no tax. Can it be supposed that Congress intended to seize upon a distinction so unsubstantial and so irrelevant to the policy of the statute?

The view taken by Judge Brewster is opposed to the decision in *Curley* v. *Tait* (D. C. Md.), 276 Fed. Rep. 840. The facts in that case were more favorable to the Government than those in the case at bar. The decedent, one Grafflin, had transferred securities in trust to pay the

income to his wife during her life and after her death, if he survived her, to himself during his life, after which the securities were to become the absolute property of the transferee. The decedent's wife outlived him. In spite of the contingent interest retained by the grantor, it was held that there was no taxable transfer within the meaning of the statute, Judge Rose saying (at p. 842):—

> "If all beneficial ownership and possession irrevocably passes from the transferror at the time of the transfer, it would seem to be immaterial whether it goes to one person or to several, and, if to several, whether their enjoyment is to be simultaneous or successive, and, if the latter, at what time or upon the happening of what event the rights of one give place to those of another.

This opinion was followed by Judge Goddard in a decision (not yet reported) rendered August 19, 1926, in the District Court for the Southern District of New York in the case of *Irving Bank-Columbia Trust Co. v. Bowers.*

So, in *Fidelity & Columbia Trust Co. v. Lucas* (D. C. W. D. Ky.), 7 Fed. (2d) 146, it was held that the statute did not apply to a conveyance of real estate in trust to pay the income during the grantor's life to himself to be applied by him for the benefit of his children in such manner as he might in his uncontrolled discretion determine and thereafter to divide the income equally between the children. Judge Dawson said (at p. 152):—

> "Neither the possession nor the enjoyment of the property by the beneficiaries as a class was made dependent upon the death of Mr. Smith. The termination of the trust and the conveyance of the property to the beneficiaries was fixed without any reference whatever to the date of his death. His death neither hastened nor postponed the day when the beneficiaries as a class should come into possession or enjoyment of the estate. Upon the execution of the deed Mr. Smith completely divested

himself of all interest in and title to the property conveyed. It is true that by Paragraph I he provided that during his lifetime, or until he should otherwise in writing direct, the net income accruing during the trust period should be paid by the trustee to him, but it was not to be received by him for his own benefit; it was to be disposed of by him at his discretion, 'in the interest of the beneficiaries hereinafter named.' Any income received by Mr. Smith under this clause of the deed was received by him in trust for the beneficiaries therein named as a class—not for his own use. It was their money, belonging to them as a class, and not his, and at his death he had no interest or title in the property to pass."

In *Cleveland Trust Co.* v. *Routzahn* (D.C.N.D. Ohio) 7 Fed. (2d) 483, Judge Westenhaver held the decision in the case at bar inapplicable to a case in which the settlor had never surrendered the life interest which he had reserved at the creation of the trust, but agreed with the result in the present case because the assignment took the transfer out of the class contemplated by the statute. The judge said (at p. 485):—

"*Coolidge* v. *Nichols* (D. C.) 4 F. (2d) 112, decision by Brewster, District Judge, January 28, 1925, is also cited and relied on by plaintiff's counsel. The reasoning of the judge supports plaintiff's contention, but the facts are not parallel. The property was transferred to a trustee with the income during life reserved to the donor and the principal payable to certain beneficiaries at or after death. Prior to the passage of the Revenue Act of 1918, the donor and life beneficiary had transferred all interest therein to the remaindermen. The death of the life tenant did not take place until more than two years had elapsed after the last transfer, so that the transaction was not one presumptively made in contemplation of death, and could be brought within the statute only by affirmative proof that it was made in contemplation of death. After the life beneficiary had transferred her

interest to the remaindermen, a naked or dry trust was left in the trustee. It seems to me that, whatever may have been the nature of the transfer when the trust was first created, it had ceased to be a trust created to take effect in possession or enjoyment at or after the death of the donor when the donor relinquished her remaining interest, or that it took effect in possession and enjoyment at that time and not at or after death. The case might well have been disposed of, it seems to me, on this view."

Judge Brewster failed, it is submitted, to give due weight to the principle that tax laws are to be construed in favor of the taxpayer and that a construction which raises serious doubts as to the constitutionality of a statute is to be avoided whenever possible. In view of his own ruling that the statute as construed by him is unconstitutional and the similar decision by the Circuit Court of Appeals for the Second Circuit in *Frew* v. *Bowers*, 12 Fed. (2d) 625, it is apparent that the constitutionality of the statute when so construed is at least open to grave question. It may be supposed that the judge would have given these rules of construction more weight if he had had before him the application of them made by this court in *Lewellyn* v. *Frick*, 268 U. S. 238, some months after the present case was tried. If there is any difference in this respect between the section of the Revenue Act of 1918 considered in *Lewellyn* v. *Frick* and that now in question, it is that the construction of § 402 (*f*) adopted in *Lewellyn* v. *Frick* in order to avoid constitutional difficulties is less obvious than the construction of § 402 (*c*) for which the executors now contend.

Judge Brewster seems, on the other hand, to have attached undue importance to cases like *State Street Trust Company* v. *Treasurer and Receiver General*, 209 Mass. 373, in which various state laws have been construed as intended to impose a tax in situations more or less like that now presented. It is suggested in the

brief for the plaintiff in error (p. 17) that these state laws in some instances impose "taxes on the right to receive" and in others "taxes on the right to transmit." Assuming for the sake of argument that this statement is correct, the fact remains that under the state laws in question the basis of the tax is what the distributees receive and not what passed from the decedent at his death. Under the state laws a tax is assessed with respect to each of the several interests acquired by the distributees and varies in each case according to the value of the interests received and other circumstances peculiar to that interest, whereas the federal estate tax (with a few exceptions not now material) is assessed without reference to who the distributees are or how the property is divided among them. It is, therefore, much more consonant with the general scheme of the Revenue Act to construe it as intended to establish as the basis of the tax only property in which the decedent had an interest at the time of his death, and this construction appears to have been approved by this court in *Young Men's Christian Association* v. *Davis*, 264 U. S. 47, the Chief Justice saying (at p. 50):—

> "What was being imposed here was an excise upon the transfer of an estate upon the death of the owner. It was not a tax upon succession and receipt of benefits under the law or the will. It was death duties as distinguished from a legacy or succession tax. What this law taxes is not the interest to which the legatees and devisees succeeded on death, but the interest which ceased by reason of death."

Again, in *Edwards* v. *Slocum*, 264 U. S. 61, the court said (at p. 62):—

> "This is not a tax upon a residue, it is a tax upon a transfer of his net estate by a decedent. . . . It comes into existence and is independent of the receipt of property by the legatee. It taxes, as Hanson, Death Duties,

puts it in a passage cited in 178 U. S. 49, 'not the interest to which some person succeeds on a death, but the interest which ceased by reason of death.' "

So, in *Wardell* v. *Blum*, 276 Fed. Rep. 226, it was held by the Circuit Court of Appeals for the Ninth Circuit that under the present statutes of California with respect to "community property" the part of such property which goes to the wife is not comprised in the husband's estate and that the part of the "community property" so going to the wife cannot, therefore, be taken into account in determining the estate tax payable by the husband's executors, although the husband had the entire management and control of the "community property" during his life. The court said (at page 227):—

"All inheritance taxes are imposed on the transfer of the net estate of the 'deceased'; from which the conclusion is inevitable that the property upon which such tax is imposed must in truth be the property of the deceased."

Moreover, the circumstance that an estate tax has reference to the interest which ceases at death, whereas a succession tax looks to the interests of the distributees, is not, as Judge Brewster seems to have assumed, the only point of difference. Equally, if not more important, is the fact that an estate tax is payable by the executor as a debt of the estate, whereas a succession tax with respect to property conveyed by the decedent to trustees in his lifetime is payable out of the trust property. Under the state laws, therefore, the result of holding that a change in the relation of the beneficiaries to the property upon the death of the settlor is a transfer taking effect in possession or enjoyment at his death is simply to subject the trust property to taxation. Hence there is no peculiar element of hardship to indicate that such taxation could not have been intended. Under the federal law, on the contrary, it would follow from the construction advo-

cated by the Government that the amount payable by the executor might be indefinitely increased through the mere accident that the decedent had named his death as the happening upon which there was to take place some change in the rights of the beneficiaries *inter sese* under a deed which he had executed in his lifetime and by which he had divested himself of all interest whatsoever. Since the executor has no remedy over against the trustees or beneficiaries under a deed of this kind, such a construction must inevitably cause great unfairness and the intention to bring about so unjust a result ought not to be imputed to Congress if the language will fairly bear another construction.

The application made of this principle in *Knowlton* v. *Moore*, 178 U. S. 41 (at p. 76), to the construction of the War Revenue Act of 1898, is exceedingly pertinent:—

> "Granting, however, that there is doubt as to the construction, in view of the consequences which must result from adopting the theory that the act taxes each separate legacy by a rate determined, not by the amount of the legacy, but by the amount of the whole personal estate left by the deceased, we should be compelled to solve the doubt against the interpretation relied on. The principle on which such construction rests was thus defended in argument. The tax is on each separate legacy or distributive share, but the rate is measured by the whole estate. In other words, the construction proceeds upon the assumption that Congress intended to tax the separate legacies, not by their own value, but by that of a wholly distinct and separate thing. But this is equivalent to saying that the principle underlying the asserted interpretation is that the house of A, which is only worth one thousand dollars, may be taxed, but that the rate of the tax is to be determined by attributing to A's house the value of B's house, which may be worth a hundredfold the amount. The gross inequalities which must inevitably result from the admission of this theory

are readily illustrated. Thus, a person dying, and leaving an estate of $10,500, bequeaths to a hospital ten thousand dollars. The rate of tax would be five per cent, and the amount of tax five hundred dollars. Another person dies at the same time, leaves an estate of one million dollars, and bequeaths ten thousand dollars to the same institution. The rate of tax would be 12½ per cent, and the amount of the tax $1,250. It would thus come to pass that the same person, occupying the same relation, and taking in the same character, two equal sums from two different persons, would pay in the one case more than twice the tax that he would in the other. In the arguments of counsel, tables are found which show how inevitable and profound are the inequalities which the construction must produce. Clear as is the demonstration which they make, they only serve to multiply instances afforded by the one example which we have just given.

"We are, therefore, bound to give heed to the rule, that where a particular construction of a statute will occasion great inconvenience or produce inequality and injustice, that view is to be avoided if another and more reasonable interpretation is present in the statute."

The decision rendered by the Supreme Court of Rhode Island in *Manning* v. *Board of Tax Commissioners*, 46 R. I. 400, a few days after the case at bar was tried, is also persuasive in this connection. Rhode Island, unlike most of the States, has both an estate tax law and a succession tax law. A testatrix left property in trust for her son during his life and gave him a power to appoint the property by his will. The son left a will which was construed as not constituting an exercise of the power, so that the property passed in default of appointment as directed in his mother's will. It was held that a succession tax was payable by the devisee who thus took in default of appointment, but that the son's estate was not chargeable with an estate tax. Although the estate tax law contained very broad language with respect to property

passing either through the exercise of a power or in default of appointment, the court declined to construe the law as intended to require that the property under consideration be deemed a part of the son's "net estate" for the purposes of the estate tax. The court said:—

> "To warrant a finding that it was the intent of the General Assembly to impose the estate tax in question at the death of the non-resident George A. Hill, it must be found that the subject of the tax, or some interest therein, was a part of his net estate. George A. Hill did not exercise the power of appointment, and we have said above neither the real property nor any interest therein was in law or in fact a part of his net estate. Neither can we find in the language of the act such a clear legislative intent to treat it as a part of his net estate as to permit a construction of the act which will support the assessment. . . . It may be conjectured that it was the intent of the General Assembly to include in such net estate, in Rhode Island, property in which he had no legal interest, but as to the succession to which he had failed to make an appointment under a power. The intent thus to burden a decedent's estate with the payment of an inheritance tax upon the transfer of property which was not his, and did not pass under his will or by the statutes of descent, is so unreasonable and unjust that we will not find the intent upon conjecture, but will require that the purpose be explicitly declared."

It is suggested in the brief for the plaintiff in error that, up to the time of Mrs. Coolidge's death, there was a possibility that all her five sons might die before her and leave no issue, in which event she would come in as one of the next of kin. That the termination of such an ultra-attenuated interest could not have been contemplated by Congress as an occasion for taxing the estate on the whole value of the trust property seems manifest.

Bradley v. *Nichols* (D. C. Mass.), 13 Fed. (2d) 857.

The argument is based, however, on a misinterpretation of the trust indenture. The next of kin who are to take in case the sons predecease the survivor of the settlors are those entitled as such "under the statute of distributions in effect at the death of such survivor"; in other words, the next of kin are to be ascertained at the death of the surviving settlor, so that neither settlor could come within the class.

> *Proctor* v. *Clark*, 154 Mass. 45.
> *Fargo* v. *Miller*, 150 Mass. 225.
> *Knowlton* v. *Sanderson*, 141 Mass. 323.

Apart from this, the assignment carried not only the interest of the settlors in the income, but whatever interest they may have had in the principal as well, so that, after the execution of the assignment, the settlors on any theory had no right in the trust property either vested or contingent.

The Government bases its argument largely on the proposition that gifts like those now in question are really testamentary in character. Whatever may be the case with regard to the ordinary gift in contemplation of death, or gifts in which life estates are reserved to the donors, it is submitted that there is no element whatever of the testamentary in an irrevocable gift by A to B for the life of A with remainder to B's heirs in fee.

It follows that the jury should have been instructed (in accordance with the executors' sixth request) that "the property referred to in the first count of the declaration as having been conveyed by Julia Coolidge to trustees was not a part of her 'net estate' within the meaning of the Revenue Act of 1918" (R. 17) and that the constitutional question is, therefore, immaterial.

(b) Without Reference to the Assignment of 1917 the Statute should not be construed as applicable to the Transfer of 1907.

Even if the assignment had not been executed, the result would be the same. Since the remainders were vested, the transfer, on the principle discussed in the second subdivision of the preceding section of this brief, took effect in possession and enjoyment upon the creation of the trust and not upon the death of Mrs. Coolidge. This principle applies, indeed, with especial force in view of the fact that the trust was created long before the federal estate tax was established. As was pointed out by the Court of Claims in *Miller* v. *United States*, (cited on p. 13, *supra*), the argument against a construction which would give rise to a tax is peculiarly strong in a case of this kind. The result is not varied by the fact that the possibility that the remainders might be divested was to cease upon the falling in of the life estates. The mere circumstance that this element of uncertainty as to which beneficiary should take would then be removed did not make the trust one taking effect in possession or enjoyment at that time.

> *Matter of Sherman*, 30 Misc. (N. Y.) 547.
> *Dexter* v. *Treasurer & Receiver General*, 243 Mass. 523.

Again, it is only by an unnecessarily literal construction of the words "created before or after the passage of this act" in § 402 (*c*) of the statute that the inclusion of the trust property in the "gross estate" can be upheld. Section 401 imposes an estate tax "in lieu of the tax imposed by Title II of the Revenue Act of 1916, as amended, and in lieu of the tax imposed by Title IX of the Revenue Act of 1917." Neither of these earlier acts contained anything purporting to impose a tax with respect to interests which had become vested prior to the establish-

ment of a federal estate tax. When the Act of 1918 imposes a tax "in lieu" of the taxes imposed by the earlier acts, the presumption is that it was intended to tax only such subjects as were within the scope of the former acts and that the words "whether created before or after the passage of this act" were meant to remove any doubt as to whether, with regard to transfers made after the estate tax was established but before the Act of 1918 was passed, the earlier acts or the Act of 1918 governed. Adequate scope can thus be given to the words "before or after" without construing them as indicating an intent to impose a tax with respect to interests which had become vested at a time when there was no federal estate tax of any kind. Congress may also be presumed to have appreciated the difference as regards the hardship caused by the tax between transactions completed at a time when no one contemplated a federal estate tax and those effected after such a tax had become a recognized part of the national fiscal system. Under the familiar rule as to the strict construction of tax laws, therefore, the Act of 1918 should be construed as not applicable to transfers made or trusts created before the Act of 1916 was passed.

Gould v. *Gould*, 245 U. S. 151.

If the words "has at any time made," etc., in the Act of 1916 mean, as was held in *Shwab* v. *Doyle*, 258 U. S. 529, "has at any time subsequent to the passage of this act made," etc., there can be no difficulty in construing the words "created before or after the passage of this act" in the Act of 1918 as meaning "created before or after the passage of this act, if created after the passage of the Act of 1916."

In the alternative, the statute might well be construed as applying to gifts antedating its enactment only where the taking effect of the gift at or after the death of the

donor was dependent on some act of his *after* the enactment of the statute; that is to say, where a power of revocation or a power of appointment had been reserved by the terms of the gift.

2. If the Revenue Act of 1918 according to its true Construction purports to authorize the Exaction imposed With Respect to the Trust Property, it is unconstitutional.

(*a*) *The Power of Congress to impose Exactions under the Name of Excises is not unlimited.*

The authority of Congress to enact a provision like that now in question must be found, if at all, in Section 8 of Article 1 of the Constitution, which grants power "to lay and collect taxes, duties, imposts and excises." While the Government argues that these words vest in Congress a wide discretion, it is not contended that any exaction which Congress may see fit to ordain under color of this provision is unassailable. The recent decisions of this court make it plain that the name given by Congress to a particular exaction is immaterial. If the object sought is one not fairly within the scope of the taxing power, it cannot be attained under the pretext of exercising that power.

Trusler v. *Crooks*, 269 U. S. 475, 482.
Linder v. *United States*, 268 U. S. 5, 17.
Lipke v. *Lederer*, 259 U. S. 557, 561.
Child Labor Tax Case, 259 U. S. 20, 38.

Again the words "taxes," "duties," "imposts" and "excises" all import some rational basis for classification. If an act of Congress imposes burdens upon some particular citizen or class of citizens singled out for no relevant reason, this is not an exercise of the taxing power, but is a mere arbitrary exaction and not within any power granted to Congress by the Constitution.

The test, as this court has said in a recent case, is whether the classification "is reasonable and not merely arbitrary and capricious."

Barclay v. *Edwards*, 267 U. S. 442, 450.

So, in *Brushaber* v. *Union Pacific Railroad*, 240 U. S. 1, the court said (at p. 24):—

> "This doctrine [*i.e.*, that the power of taxation granted to Congress by Article I of the Constitution is not cut down by the Fifth Amendment] would have no application in a case where although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property, that is, a taking of the same in violation of the Fifth Amendment, or, what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion."

The power of classification enjoyed by Congress under Article I of the Constitution is not, in fact, substantially different from that conferred upon the legislatures of the States by the corresponding provisions of the state constitutions. The well-recognized limitations upon the power of a state legislature to classify persons or property for purposes of taxation were not brought into being by the Fourteenth Amendment, which, as was said in *Keeney* v. *New York*, 222 U. S. 525 (at p. 535), "does not diminish the taxing power of the State." So far, indeed, as the matter of taxation is concerned, the amendment merely re-enacts a limitation which is implied in the several state constitutions.

Lexington v. *McQuillan*, 9 Dana, 513, 517.
Thompson v. *Kidder*, 74 N. H. 89, 91.
Kitty Roup's Case, 81½ Penn. St. 211.

This is illustrated by a recent case in which this court has stated the extent of the States' taxing power in terms almost identical with those used in other cases to define the taxing power of the United States:—

> "A state tax law will be held to conflict with the Fourteenth Amendment only where it proposes or clearly results in such flagrant and palpable inequality between the burden imposed and the benefit received as to amount to the arbitrary taking of property without compensation —'to spoliation under the guise of exerting the power of taxing.'"
>
> Clarke, J., in *Dane* v. *Jackson*, 256 U. S. 589 (at p. 599).

(*b*) *The Tax is upon all the Transfers of the various Kinds specified in the Statute, not simply upon the Transfer of the "Estate" in the ordinary Sense*, i. e., *the Property subject to Distribution by the Decedent's Executor or Administrator.*

The value of the "net estate," according to § 403 of the statute, is to be ascertained by deducting certain items from the value of the "gross estate." It is provided in § 402 that the value of the "gross estate" is to be determined by including, among other things, the value at the time of the decedent's death of all property "to the extent of any interest therein of which the decedent has at any time made a transfer or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this act) except in case of a bona fide sale for a fair consideration in money or money's worth." Section 401 provides that "a tax equal to the sum of the following

percentages of the value of the net estate (determined as provided in Section 403) is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this act." The question at once arises as to what is meant by "the transfer of the net estate." If this language refers to the transfer of the various classes of property considered in arriving at the value of the "net estate," it follows that, in so far as property transferred prior to the establishment of the tax is taken into account, the tax is on the transfer of that property in the past. Counsel for the Government recognize the great difficulty of sustaining such a tax, and so put forward the theory that what is taxed is the transfer of the property actually owned by the decedent at the time of his death and that the value of the property transferred in the past is a mere measure. This position is stated as follows in the brief for the plaintiff in error (pp. 25–27):—

> "This Court has said that the Federal Estate Tax is a tax imposed upon the transfer of a decedent's net estate; that the occasion of the tax is the cessation of his interest in property. The nature of the tax as stated by this Court in *Young Men's Christian Association of Columbus, Ohio*, v. *Davis*, 264 U. S. 47, is as follows (p. 50): [quoting the passage already quoted on p. 20 of this brief].
>
> "Neither the plaintiff in error nor the defendant in error attacks this description of the Federal Estate Tax, but starting from this fundamental conception of the tax the argument of the defendant in error departs from that of the Government in its conception not only of the 'transfer' which is taxed but also of the property which composes the 'net estate.' The defendant in error bases his argument upon the conception that the transfer which is taxed is any transfer within the description of Section 402 of the Act, and that the net estate which is transferred is composed of the property described in Section 402,

less the deductions described in Section 403. The Government, on the other hand, considers that, since the tax is upon the cessation of the decedent's interest in property and is occasioned by death, the transfer which occasions the tax is necessarily that transfer which takes place at death, and that the 'net estate,' the transfer of which is taxed, is necessarily the decedent's property at the time of death. The 'net estate' refers not to the property described in Section 402 of the statute but to the net estate as commonly understood—to the property and interests in property which the decedent actually owned at the time of his death above his liabilities."

This argument flies in the face of the statute. Section 409 provides that the tax "shall be a lien for ten years upon the gross estate of the decedent", meaning by "gross estate," as the subsequent provisions unmistakably show, all the various classes of property enumerated in § 402. Section 409, moreover, provides that, if the decedent makes a transfer of property intended to take effect in possession or enjoyment at or after his death and if the tax "*in respect thereto*" is not paid when due, the transferee shall be personally liable. How Congress could more plainly have declared that the tax is in part imposed upon all such transfers is not easy to see. Neither is it apparent how the value of property transferred by the decedent in his lifetime can be deemed a mere measure of a tax on the transfer of the estate properly so called, if the person to whom the transfer was made by the decedent is liable to the tax "with respect" to such property.

If confirmation of this view is needed, it is found in § 401. By the express language of this section the tax is to be equal to certain percentages of the value of the "net estate (determined as provided in § 403)." The Government's theory involves the assumption that, when in the next line of § 401 the statute says that the tax is imposed "upon the transfer of the net estate," the

words "net estate" are used in a sense entirely different from that in which the same words have been used just before. It likewise involves the assumption that, although prior to the establishment of the estate tax the term "net estate" was not in common use and had acquired no well-defined meaning, this expression, when used to describe the subject of taxation, was left with no definition at all, in spite of the care taken by the framers of the statute to specify the meaning of less important words.

It necessarily results from the Government's theory that, if a decedent owns no property whatever at the time of his death, no tax can be collected from anybody. Before property previously transferred can be used as the "measure" of a tax on the transfer of the "estate" in the ordinary sense, there must be an "estate" to which the tax may attach. The position now taken by the Government, therefore, is exactly the opposite of that taken in *Levy* v. *Wardell*, 258 U. S. 542, in which the decedent left no property of any kind, but in which the Government strenuously contended that there was a tax with respect to property transferred by him in his lifetime.

It is said in the brief for the plaintiff in error (p. 11) that "certain property which is included in the gross estate is not the occasion of the tax either directly or by reason of its transmission, for some unidentified part of the property included in the gross estate is excluded from the estate which gives rise to the tax," and (p. 27) that "the *value* of the gross estate is to be *determined* by a statutory rule of values which may or may not conform to the facts." This argument does not help the Government, because the deductions are taken indiscriminately from all the property comprised in the "gross estate." If, because of these deductions, it was correct to say that the tax was not on the transfer of property conveyed by the decedent in his lifetime, it would be equally true that the tax was not on the transfer of the

property owned by him at his death. If the latter proposition is unsound,—and it must be, since otherwise there would be no transfer of any kind to which the tax could attach,—the fact that deductions are allowed does not make the exaction any less a tax on the transfer of the property conveyed before death than a tax on the transfer of the property actually passing from the decedent at death.

The idea that the "net estate" whose transfer is taxed is the property subject to administration and not the property whose value constitutes the basis of the tax is also inconsistent with the provision of § 408 as to the payment of taxes assessed with respect to insurance policies:—

> "If any part of the gross estate consists of proceeds of policies of insurance upon the life of the decedent receivable by a beneficiary other than the executor, the executor shall be entitled to recover from such beneficiary such portion of the total tax paid as the proceeds, in excess of $40,000, of such policies bear to the net estate."

The "gross estate," it will be seen, is spoken of in this passage as "consisting," among other things, of the proceeds of insurance policies not payable to the executor, while the part of the tax recoverable by the executor from the beneficiaries is to be computed according to the ratio between such proceeds and the "net estate." It is inconceivable that Congress meant that the amount chargeable to the beneficiaries of insurance policies should be calculated with reference to the "estate," strictly so called, when the total tax to which such beneficiaries are required to contribute is figured on a basis entirely different; the passage is intelligible only on the assumption that Congress understood "net estate" to mean the "gross estate" less the statutory deductions. Indeed, the inconsistency of § 408 with the measurement theory has been declared by this court in *Lewellyn* v. *Frick*,

268 U. S. 238. With reference to the personal liability imposed by this section upon the beneficiaries of insurance policies, Mr. Justice Holmes said (at p. 251):—

> "In view of their liability the objection [that the tax constitutes a taking of property without due process of law] cannot be escaped by calling the reference to their receipts a mere measure of the transfer tax."

All these considerations show that the tax is upon all the transfers of the various kinds specified by the statute, *i. e.*, the present transfer of the property owned by the decedent at the time of his death and all past transfers of the kinds specified in the statute.

(*c*) *Whether regarded as imposing a Tax on past Transfers or as using past Transfers as the Measure of a Tax on the actual Transfer which takes Place at the Decedent's Death, the Statute, as applied to the Facts now appearing, is unconstitutional.*

(i) If the foregoing analysis is correct, the answer to the constitutional question seems plain.

It is unnecessary to debate at length the broad issue as to whether the statute is valid as applied to situations in which the decedent, as an incident to a transfer made before the estate tax was established, retained a life interest followed by a vested remainder. If that question were presented, this court would, it is believed, recognize the soundness of the many decisions in which various state courts have held that an attempt to tax such past transfers constitutes a taking of private property without compensation. In the leading case of *Matter of Pell*, 171 N. Y. 48, the court said (at p. 55):—

> "This court and the Supreme Court of the United States have held in numerous cases that the transfer tax is not imposed upon property, but upon the right of succession. It, therefore, follows that where there was a complete vesting of a residuary estate before the enact-

ment of the transfer tax statute, it cannot be reached by that form of taxation. In the case before us it is an undisputed fact that these remainders had vested in 1863, and the only contingency leading to their divesting was the death of a remainderman in the lifetime of the life tenant, in which event the children of the one so dying would be substituted. If these estates in remainder were vested prior to the enactment of the Transfer Tax Act there could be in no legal sense a transfer of the property at the time of possession and enjoyment. This being so, to impose a tax based on the succession would be to diminish the value of these vested estates, to impair the obligation of a contract and take private property for public use without compensation."

To the same effect are—

Matter of Lyon, 233 N. Y. 208.
Hunt v. *Wicht*, 174 Cal. 205.
State v. *Probate Court of Washington County*, 102 Minn. 268.
Houston's Estate, 276 Penn. St. 330.
Commonwealth v. *Wellford*, 114 Va. 372.
Lacey v. *State Treasurer*, 152 Iowa, 477.

If a succession tax cannot be imposed in such a situation, the same is true *a fortiori* as to an estate tax. With respect to a succession tax, it may be argued with a certain plausibility that the remainderman's coming into actual possession is a "taxable occasion," but this is not the case as to an estate tax, since the only act done or privilege exercised by the grantor was in the past.

In *Wright* v. *Blakeslee*, 101 U. S. 174, the interest with respect to which the tax was imposed was wholly contingent until the settlor's death, so that the principle upon which the decision in *Matter of Pell* rests was inapplicable. *Scholey* v. *Rew*, 23 Wall. 331, is even less pertinent, as the transfer in that case took place under the will of a person who died after the establishment of the tax.

The present question, however, is not whether the rule laid down in *Matter of Pell* should be followed by this court to the full extent. It will be remembered that the trust was created in 1907 and that the assignment was executed in 1917. While the Revenue Act of 1916 was in force at the date of the assignment, that act did not assume to include in the "gross estate" property held under irrevocable trusts established before its enactment.

Shwab v. *Doyle*, 258 U. S. 529.

The situation now presented, therefore, is an attempt by Congress to tax a transfer whereby an owner of property had, at a time when the transfer was in no way taxable, divested herself of all interest in the property and of all control over it. Such a tax must, of course, be sustained, if at all, as an excise, since it is not apportioned among the States according to population. That it cannot be supported as an excise seems equally clear when the nature of an excise is considered. In *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, this court (at p. 151) adopted the definition of excises given in Cooley on Constitutional Limitations, 7th Ed., 680, *i.e.*, that excises are "taxes laid upon the manufacture, sale or consumption of commodities within the country, upon licenses to pursue certain occupations, and upon corporate privileges." So, in *Thomas* v. *United States*, 192 U. S. 363, the court said (at p. 370) with reference to the words "duties, imposts and excises" appearing in Article I of the Constitution:—

> "We think that they were used comprehensively to cover customs and excise duties imposed on importation, consumption, manufacture and sale of certain commodities, privileges, particular business transactions, vocations, occupations and the like."

Since an excise *ex vi termini* is thus a tax upon the doing of some act or the exercise of some privilege, a tax

based solely upon the fact of having done some act or exercised some privilege in the past cannot be sustained as an excise. The principle was stated as follows in a decision (as yet unreported) rendered by Judge Geiger in the United States District Court for the Eastern District of Wisconsin on November 22, 1926, in the case of *Lefeber* v. *Wilkinson*. The question was whether the retroactive provisions of the Revenue Act of 1924 as to the gift tax could be sustained as establishing an excise, and the court said:—

> "The whole proposition comes down to the single direct statement: can an excise tax be effective other than *in futuro?*
>
> "The case comes here really with the necessity, as I might say, of deciding the case definitively. The proposition that is presented here rests ultimately upon the definitive inclusion or exclusion of elements and ingredients in what is called an "excise"; I mean, the so-called burden which we term an excise; and it would seem to me that the implication is that as between the Government and the subject who is expected to be reached by the law, either in respect of his property, or, as we might say, of his conduct, of his movements, that will be open to choice; the implication in an excise not theretofore existing or not theretofore exacted, to the subject is: 'If you want to do this particular thing, you can do it with the burden attaching to you, which we will now impose on you.'
>
> "Then, in the case of a gift, as in the case of certain other taxes that are not direct taxes, the subject can take his choice. If he wants to do it he must submit to the burden which the law imposes upon the doing of the act; but, when it appears that the act has been fully completed prior to the passage of the law, why of course the burden is imposed without the choice of relief by concluding not to exercise the privilege.
>
> "Now, when that is so, the question is particularly asked. Here are the gifts made in February and May,

1924, prior to the passage of this act. It seems absurd to say that the Nunnemacher and LeFeber donors should be told on June 2, 1924 that they are now subjected to an excise upon an act wholly beyond their power to revoke, recall, or do a thing in respect of what they had previously done; and how then can you escape the idea, although it is called an excise, that it is nothing more or less than a direct tax, either against their property or against them, in respect of a completed transaction, which, if I might put it that way, at the time Congress passed the law was no longer, as to them, *excisable?*"

As to interests vested before the establishment of an estate tax, no new act is done and no privilege is exercised after the passage of the tax law. The actual entering into the occupation or usufruct of the property is one of the inherent incidents of ownership and a tax upon it, whatever its name, is not an excise, but a tax on the property.

> *Dawson* v. *Kentucky Distilleries Co.*, 255 U. S. 288.

In *Matter of Craig*, 97 App. Div. 289, this principle was applied to the transfer tax law of New York, Hirschberg, P.J., saying (at p. 296):—

> "I do not lose sight of the fact that the transfer tax is levied, not upon the property affected, but upon the right of succession. The underlying principle which supports the tax is that such right is not a natural one but is in fact a privilege only, and that the authority conferring the privilege may impose conditions upon its exercise. But when the privilege has ripened into a right it is too late to impose conditions of the character in question, and when the right is conferred by a lawfully executed grant or contract it is property and not a privilege, and as such is protected from legislative encroachment by constitutional guaranties."

This decision was affirmed by the Court of Appeals on the opinion of the Appellate Division (181 N. Y. 551).

The applicability of these principles is virtually conceded by the Government, since it is said in the brief for the plaintiff in error (p. 30) that "the provisions relating to the measure of the tax have been made to include transactions not in themselves taxable transactions." Elsewhere in the brief (p. 39) it is asserted that "a retroactive excise is constitutional," but the argument is manifestly half-hearted. That the proposition just quoted cannot be sound is apparent on its face, unless it is taken as meaning merely that something in the past, *e.g.*, income received during a preceding year, may sometimes be used as the measure of an excise on a present transaction. As is shown by the cases cited on pages 39 to 42 of the brief for the plaintiff in error (such as *Billings* v. *United States*, 232 U. S. 261) administrative considerations sometimes make it necessary to use as the initial measure of an income tax or other tax recurring at regular intervals a short period immediately preceding the enactment of the tax law and, when this is true, it may not be possible to say that the measure of the tax has so little relation to the subject taxed as to render it "arbitrary and capricious." This, however, is entirely different from saying that an exaction based upon an isolated transaction which occurred many years before the statute was enacted can be regarded as a "tax" in any proper sense.

It will be remembered in this connection that a general income tax is a direct tax and not an excise, so that retroactive provisions with respect to such a tax do not come within the rules governing excises and may well be valid, even if a retroactive excise would be void.

The Government's assertion cannot be right in any broad sense, unless it be that there is no limit to the unjust and oppressive exactions which may be imposed

under the name of excises. It certainly is not true, for example, that a person who made a sale of real estate twenty years ago may now be required to pay as an excise a percentage of the price. If so, there is no foundation for imposing after the death of a settlor a tax on a transfer which was in all respects complete and irrevocable and by which, at a time when the transaction was not taxable, he divested himself of all interest in the property and of all control over it.

(ii). The result is the same if it be assumed that by some process the statute may be taken to mean exactly the reverse of what it says it means and may be construed as imposing a tax only upon the transfer of the decedent's "estate" in the ordinary sense, using the value of the property transferred in his lifetime as a measure of the tax. The fundamental difficulty still remains, for the reason that, if the past transfer cannot itself be taxed, the obstacle cannot be evaded by imposing the tax ostensibly on something else and measuring that tax by the non-taxable transfer.

> "One ground on which the state court put its decision was that, in taxing the transfer of the property which the decedent owned in Pennsylvania, it was admissible to take as a basis for computing the tax the combined value of that property and the property in New York and Massachusetts. Of course, this was but the equivalent of saying that it was admissible to measure the tax by a standard which took no account of the distinction between what the State had power to tax and what it had no power to tax, and which necessarily operated to make the amount of the tax just what it would have been had the State's power included what was excluded by the Constitution. This ground, in our opinion, is not tenable. It would open the way for easily doing indirectly what is forbidden to be done directly, and would render important constitutional limitations of no avail. If Pennsylvania

could tax according to such a standard, other States could. It would mean, as applied to the Frick estate, that Pennsylvania, New York and Massachusetts could each impose a tax based on the value of the entire estate, although severally having jurisdiction of only parts of it. Without question each State had power to tax the transfer of so much of the estate as was under its jurisdiction, and also had some discretion in respect of the rate; but none could use that power and discretion in accomplishing an unconstitutional end, such as indirectly taxing the transfer of the part of the estate which was under the exclusive jurisdiction of others."

Van Devanter, J., in *Frick* v. *Pennsylvania*, 268 U. S. 473 (at p. 494).

Apart from this well-settled principle, the tax, as it affects the present situation, is, to apply the test laid down in *Barclay* v. *Edwards*, 267 U. S. 442, "merely arbitrary and capricious." The measure of a permissible excise must, as the Government virtually concedes, have some reasonably close relation to the subject taxed. Thus, it will probably not be argued that a stamp tax on deeds measured, not only by the value of the property conveyed, but also by the value of other property conveyed many years previously, could be sustained an excise. In the case at bar Judge Brewster stated as follows his reasons for deeming this principle applicable to the facts before him (R. 26):—

"From the agreed facts it must be admitted that the property sought to be included as a part of the decedent's estate belonged to others at the time of her death. Clearly, there must be some limitation to the power of Congress to exact a tax on one measured by property of another. I take it the Government would not seriously contend that an estate tax could be levied upon the estate of A, to be measured by the value of B's property, when neither the property of B nor the manner of its acquisition bore any reasonable relation to the subject matter of the tax.

"I am unable to perceive on what grounds it could be successfully claimed that the transfer in question, or the property transferred, could be said to bear any reasonable relation to the thing taxed. If, at the time of her death, the decedent had some interest in the property which terminated by reason of said death, or if, at the time the transfer was made, it was taxable, a different situation would arise. In the case before us neither of these conditions exist. The right to impose a tax carries with it the right to adopt all reasonable measures to prevent an evasion of the tax. On this ground the power to measure an estate tax may properly be extended to gifts in contemplation of death or gifts to take effect after death, because both are transfers in the nature of testamentary dispositions and could be easily resorted to for the purpose of evading the tax. I entertain, however, grave doubts whether such power could be reasonably extended to such a transfer, if completed before the effective date of the law. In every case of transmission by will, intestate laws or transfers to take effect after death or in contemplation of death, a power, right or privilege has been exerted or exercised. When one has availed himself of this privilege with knowledge of the tax, actual or constructive, he has voluntarily subjected himself to its burden, and a statute which includes in the measure of the tax the value of the property thus transferred may well be deemed to have provided a reasonable classification, and this even if the decedent has entirely parted with all interest in the property; but when one has, prior to the imposition of the tax, parted with all control over or interest in the property, the classification becomes arbitrary and unreasonable."

In *Frew* v. *Bowers*, 12 Fed. (2d) 625, the Circuit Court of Appeals for the Second Circuit went still further and held that the statute was invalid even as applied to a trust under which the settlor retained a life interest. Judge Hough said (at p. 628):—

"If the technical instruction is wrong, then we must face the question whether it is within the power of Con-

gress to do what has been done; *i.e.*, use the property of A. as a measure for the tax to be laid upon B. Thus stated, it would seem impossible to support the tax; attack must be on the form of statement. We have at great length examined the assemblage of phenomena that make up this case, in order to ascertain what they amount to; and we think the foregoing an accurate statement of what the tax at bar really is.

"If that description be accepted, while there is no classification of taxpayers, the tax itself is 'arbitrary and capricious.' *Barclay* v. *Edwards*, 267 U. S. 442, 450. Further, a tax on a transfer by A., but measured by anything other than the estate of A., may be a duty or excise in form, but it is a palpable effort to tax something other than the transfer. In this case the effort is to tax in 1922 in respect of something untaxable in 1910. Cf. *Lewellyn* v. *Frick*, 268 U. S. 238 at 251.

"If it be said that Congress might have taxed the 1910 transfer, and therefore can tax it even in 1922, the answer is that nothing of the kind has been attempted. There is no tax now laid on the transfer of 1910, nor the property transferred. Could Congress in 1922 have laid a tax on Mr. Nash because he gave away $200,000 in 1910? If that be assumed as possible, it is not possible that the tax so laid, and computed on the gift, its credits and gains, could ever be an excise on the transfer.

"But if the tax be laid as it actually has been, and called an excise on the transfer of something else, the name is merely false, there is no excise, and the exaction falls into the category of unapportioned direct taxes. We think this an effort to use a constitutional power as a hook on which to hang a cloak that conceals unconstitutional action. There is no real difference between disguising this direct tax under the name of a duty, and laying a tax in order generally to regulate some subject taxable, but not otherwise subject to national regulation. The real purpose is dealt with, notwithstanding the cloak. *The Child Labor Case*, 259 U. S. 20, is the leading example."

The present case, as Judge Brewster points out, does not involve the question as to how far a transfer made after the tax has been established may be used as the measure of a tax imposed upon the transfer of the settlor's estate at his death. It may be that, where the settlor has notice at the time he makes the transfer, that this transfer will be taken into account in fixing the estate tax at his death, the objection of capriciousness and irrelevancy does not apply to the same extent, but that point is not now before the court.

Neither is it necessary to discuss the power of Congress to take account of transfers *inter vivos* in order to make the tax upon the transfer of decedent's estates effectual. A tax upon an irrevocable transfer made before the tax was established cannot be upheld on this ground.

Schlesinger v. *Wisconsin*, 270 U. S. 230.

The suggestion in the brief for the plaintiff in error (pp. 47 and 48) that "Congress has a right to prevent any person from disposing of any property gratuitously unless provision is made for taxes" and that Congress "can avoid voluntary conveyances which operate to deprive the Government of its power to collect its taxes," is manifestly irrelevant as applied to such transfers; indeed, it is frankly stated in the brief for the plaintiff in error (p. 20) that the purpose of Congress in undertaking to extend the tax to past transfers "was not to prevent evasions of the tax."

It will also be observed that, if the statute is construed as applying to the present situation, it means that, if an owner of property gives it to A for the life of the donor, with remainder to B in fee, there is a tax, but that, if he gives it to A for his own life and then over, there is no tax. This is an utterly irrational distinction and is in itself enough to show that, if the construction urged by

the Government is adopted, the statute is manifestly "arbitrary and capricious."

The Government argues that the object of the provisions now in question was to make the tax operate with equality. If so, they were strangely misconceived. In the briefs filed by the various *amici curiae* appear many illustrations of the extraordinary inequality and injustice which not only is theoretically possible but is certain to arise in the application of the statute to situations frequently occurring.

In the first place, it may happen that, as the result of an exaction which could not possibly have been foreseen, the entire property owned by a settlor at the time the tax was established is appropriated to the payment of the tax, so that he is powerless to make provision for those having the strongest claims upon him. This has actually happened with regard to the estate of Anne B. Austin, in the interest of whose executor Isaac B. Lipson, Esq., has filed a brief as *amicus curiae* in the case at bar; as appears from Mr. Lipson's brief, the result, if the tax is sustained, will be that the entire property left by the testatrix will be exhausted, so that her husband, who took nothing under the first indenture which she had executed long before any federal estate tax was thought of and for whom she undertook to provide by her will, can receive nothing.

A second difficulty arises from the provision that the recipient of a transfer made by the decedent in his lifetime shall be personally liable, if the tax is not paid by the executor. The effect of this is to make the liability of the recipient dependent on the fortunes of the grantor subsequently to the making of the transfer. If a person transfers substantially his entire property and thereafter acquires additional property, so that at his death his estate is equal to the amount of the tax, the recipient of the property transferred in his lifetime is free from lia-

bility. On the other hand, if the grantor, although retaining ample property at the time he made the transfer, meets with reverses, so that his estate is insufficient to pay the tax, the recipient is charged with liability. Nothing, it is submitted, could be more purely "capricious" than a liability thus dependent on circumstances wholly fortuitous and incapable of being foreseen.

Once more, the property transferred by the decedent in his lifetime is not taken at its value at the time of the transfer but at its value at the date of death. During the interval it may have happened, as in the case at bar, that the investments have been largely changed, yet the tax is nevertheless on the value at that time of the property originally transferred. The tax, therefore, bears no relation either to the original amount of the gift or to the property which comes into possession upon the settlor's death. A hypothetical case makes this clear.

In 1900 an owner of real estate then worth $100,000 transfers it to trustees, reserving a life interest. The value of the real estate which was the original subject of the trust has increased to $500,000 when the settlor dies in 1920. Soon after the establishment of the trust, however, the real estate is sold and the proceeds invested in other property which greatly depreciates, so that the actual value of the trust property at the date of the settlor's death is only $5,000. The estate in the hands of the executors is insufficient to pay the tax. The donees are personally liable for exactly the same amount as if the original investment had been retained, although the property which they actually receive is equivalent only to a minute fraction of the value of that originally held.

The unreasonableness of the tax may be further illustrated by supposing that many years before the tax was established an owner of property so transfers it as to vest in the donee the remainder after a life estate. The

remainderman's affairs shortly thereafter become involved and he is adjudicated bankrupt, so that the remainder is sold by the trustee in bankruptcy. The transferor eventually dies, leaving an estate insufficient to pay the tax computed on the then value of the property originally transferred. Although the remainderman has had no interest in this property for many years and has had no benefit from it except as the proceeds may have been used to pay a dividend to his creditors, he is, nevertheless, personally liable for a tax based on the value of the property at the date of the grantor's death, which may be greatly in excess of the value at the time of the transfer.

These and other illustrations which may readily be suggested amply warrant the characterization of the tax contained in the concurring opinion delivered by Judge Hand in *Frew* v. *Bowers*, 12 Fed. (2d) 625 (at p. 630):—

> "In substance it [*i.e.*, the Revenue Act of 1918] imposes a tax upon the settlor, measured by the value of property at his death, over which he has parted with all control, perhaps, as here, long since. As to transfers made after the law went into effect I have nothing to say; one may insist that settlors take their chances. But as to those made before the law was passed it appears to me that the result is too whimsical to stand. There are settlements which the settlor outlives for 30 or 40 years. There is no limit to the increase in the value of land, for example, in such a period; it may easily be fiftyfold and the tax leave the settlor destitute when he dies. Conversely, another settlor may escape altogether. Such a tax is fixed by the mere sport of fortune. It has no more relation to the possessions or conduct of the taxpayer than if he were taxed upon the subsequent value of property he had sold outright, or his estate was doubled because he died on Wednesday. Such a law is far more capricious than merely retroactive taxes. Those do indeed impose unexpected burdens, but at least they distribute

them in accordance with the taxpayer's wealth. But this section distributes them in accordance with another's wealth; that is a far more grievous injustice."

As has already been pointed out, it necessarily follows from the Government's theory that if, as in *Levy* v. *Wardell*, 258 U. S. 542, the settlor leaves no estate whatever, there can be no tax. If, however, the settlor leaves an estate of trifling value, say $100, the donee is liable for a tax based upon the value at the date of the death of all the property originally transferred. If a tax which depends upon purely accidental circumstances of this nature is not "arbitrary and capricious," it is not easy to imagine one to which those words would apply.

The gist of the Government's argument is that the law simply provides a measure for the tax and that the measure is not unreasonable because it includes only property which has been disposed of in a quasi-testamentary way. On page 29 of the brief for the plaintiff in error it is said that "if, on the whole, the transaction has so resulted that it amounts substantially to a testamentary transfer, the value of the property affected is included in the measure of the tax." For the purposes of the case at bar it is unnecessary to determine just how far this theory may warrant the application of the statute to cases in which a life interest is retained by the transferor. In order to maintain its position as regards the present case, the Government must say that an irrevocable gift to A for the life of the transferor with remainder to A's heirs,—which is the effect of the trust indenture in the present case when taken in connection with the assignment,—is quasi-testamentary, although it is not pretended that a gift to A in fee, not made in contemplation of death, could be regarded as testamentary or that there would be any testamentary element in a gift to A for his own life with remainder to his heirs. If the Government is right, a trust for the benefit of A and his descend-

ants for fifty years, after which the property is to go to Harvard College, is quasi-testamentary, but the unreasonableness of any such assertion is apparent on its face. As applied to a situation like that now presented, the argument based upon the propriety of taxing quasi-testamentary gifts is, in short, wholly irrelevant.

It is accordingly submitted that the District Court was manifestly right in ruling that "if the Revenue Act of 1918, according to its true construction purports to authorize the exaction of the payment referred to in the first count of the declaration [*i. e.*, the exaction based upon the trust property], it is to that extent void, because not an exercise of any power granted to Congress by the Constitution of the United States" (R. 17, 28).

Upon any view of the case, the District Court was right in directing a verdict in favor of the executors for the full amount in controversy, so that the judgment should be affirmed.

ROBERT G. DODGE,
HAROLD S. DAVIS.

APPENDIX

Extracts from Revenue Act of 1918

Sec. 400. That when used in this title—

The term "executor" means the executor or administrator of the decedent, or, if there is no executor or administrator, any person who takes possession of any property of the decedent; and

The term "collector" means the collector of internal revenue of the district in which was the domicile of the decedent at the time of his death, or, if there was no such domicile in the United States, then the collector of the district in which is situated the part of the gross estate of the decedent in the United States, or, if such part of the gross estate is situated in more than one district, then the collector of internal revenue of such district as may be designated by the Commissioner.

Sec. 401. That (in lieu of the tax imposed by Title II of the Revenue Act of 1916, as amended, and in lieu of the tax imposed by Title IX of the Revenue Act of 1917) a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in Section 403 (*par.* 298–310), is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States:

* * * * *

Sec. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate;

(b) to the extent of any interest therein of the surviving spouse, existing at the time of the decedent's death as dower, courtesy, or by virtue of a statute creating an estate in lieu of dower or courtesy;

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;

(d) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent;

(e) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except in case of a bona fide sale for a fair consideration in money or money's worth; and

(f) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life.

SEC. 403. That for the purpose of the tax the value of the net estate shall be determined—

(a) In the case of a resident, by deducting from the value of the gross estate—

(1) Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages, losses incurred during the settlement of the estate arising from fires, storms, shipwreck, or other casualty, or from theft, when such losses are not compensated for by insurance or otherwise, and such amounts reasonably required and actually expended for the support during the settlement of the estate of those dependent upon the decedent, as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered, but not including any income taxes upon income received after the death of the decedent, or any estate, succession, legacy, or inheritance taxes;

(2) An amount equal to the value at the time of the decedent's death of any property, real, personal, or mixed, which can be identified as having been received by the decedent as a share in the estate of any person who died within five years prior to the death of the decedent, or which can be identified as having been acquired by the decedent in exchange for property so received, if an estate tax under the Revenue Act of 1917 or under this Act was collected from such estate, and if such property is included in the decedent's gross estate;

(3) The amount of all bequests, legacies, devises, or gifts, to or for the use of the United States, any state, territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit

of any private stockholder or individual, or to a trustee or trustees exclusively for such religious, charitable, scientific, literary, or educational purposes. This deduction shall be made in case of the estates of all decedents who have died since December 31, 1917; and

(4) An exemption of $50,000;

* * * * *

SEC. 408. That if the tax herein imposed is not paid with 180 days after it is due, the collector shall, unless there is reasonable cause for further delay, proceed to collect the tax under the provisions of general law, or commence appropriate proceedings in any court of the United States, in the name of the United States, to subject the property of the decedent to be sold under the judgment or decree of the court. From the proceeds of such sale the amount of the tax, together with the costs and expenses of every description to be allowed by the court, shall be first paid, and the balance shall be deposited according to the order of the court, to be paid under its direction to the person entitled thereto.

If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this title that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution. If any part of the gross estate consists of proceeds of policies of insurance upon the life of the decedent receivable by a beneficiary other than the executor, the executor shall be entitled to recover

from such beneficiary such portion of the total tax paid as the proceeds, in excess of $40,000, of such policies bear to the net estate. If there is more than one such beneficiary the executor shall be entitled to recover from such beneficiaries in the same ratio.

SEC. 409. That unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien. If the Commissioner is satisfied that the tax liability of an estate has been fully discharged or provided for, he may, under regulations prescribed by him with the approval of the Secretary, issue his certificate releasing any or all property of such estate from the lien herein imposed.

If (a) the decedent makes a transfer of, or creates a trust with respect to, any property in contemplation of or intended to take effect in possession or enjoyment at or after his death (except in the case of a bona fide sale for a fair consideration in money or money's worth) or (b) if insurance passes under a contract executed by the decedent in favor of a specific beneficiary, and if in either case the tax in respect thereto is not paid when due, then the transferee, trustee, or beneficiary shall be personally liable for such tax, and such property, to the extent of the decedent's interest therein at the time of such transfer, or to the extent of such beneficiary's interest under such contract of insurance shall be subject to a like lien equal to the amount of such tax. Any part of such property sold by such transferee or trustee to a bona fide purchaser for a fair consideration in money or money's worth shall be divested of the lien and a like lien shall then attach to all the property of such transferee or trustee, except any part sold to a bona fide purchaser for a fair consideration in money or money's worth.